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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 10000

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
HUSTON THOMPSON, ET AL, ETC., APPELLANTS,

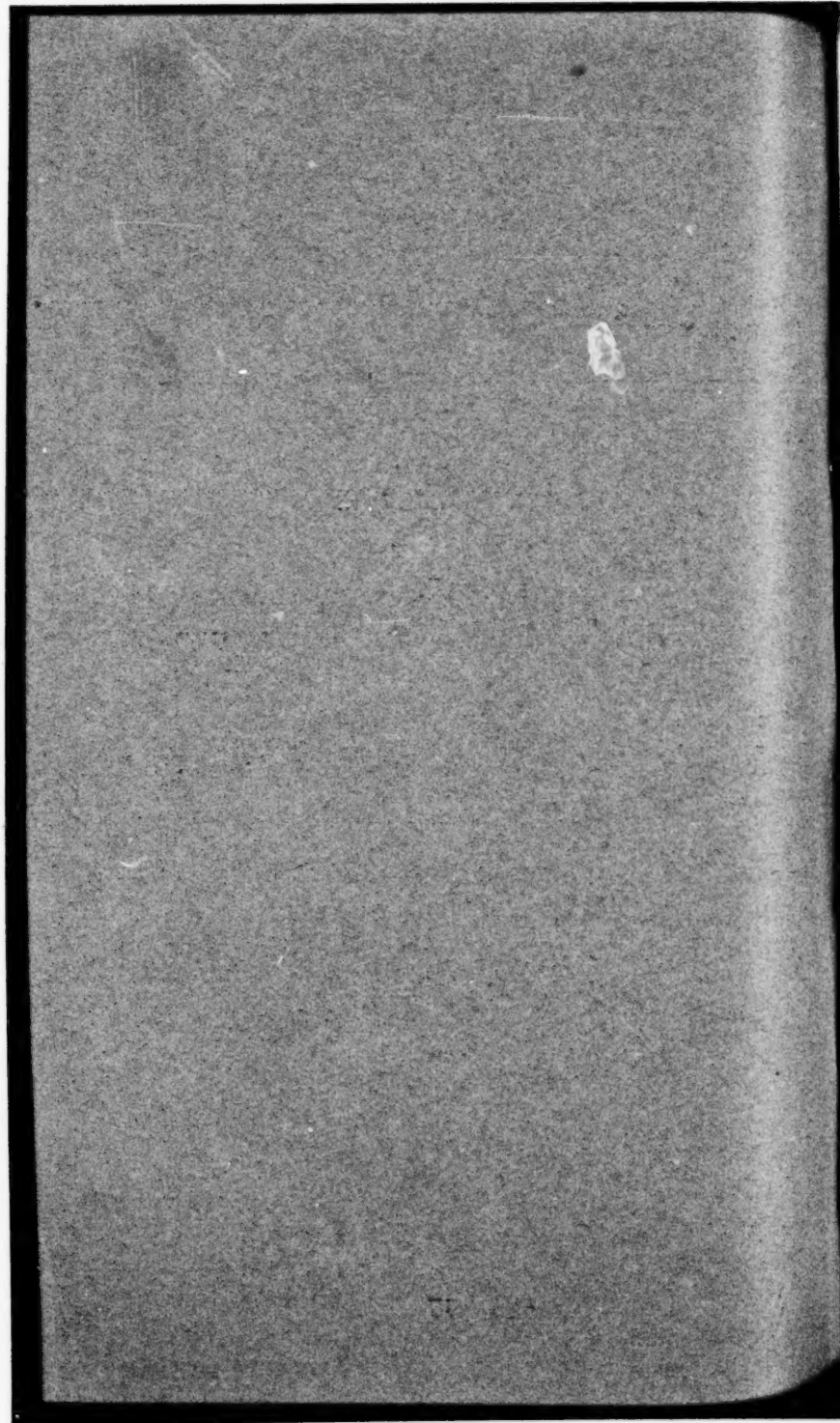
vs.

CLAIRE FURNACE COMPANY, THE ELLA FURNACE
COMPANY, RELIANCE COKE COMPANY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

FILED MARCH 21, 1926.

(29457)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 917.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
HUSTON THOMPSON, ET AL., ETC., APPELLANTS,

vs.

CLAIRE FURNACE COMPANY, THE ELLA FURNACE
COMPANY, RELIANCE COKE COMPANY, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original.	Print.
Record from Supreme Court of the District of Columbia.....	1	1
Caption	1	1
Bill of complaint.....	2	2
Exhibit A to bill of complaint—Resolution of Federal Trade Commission.....	11	11
Exhibit B to bill of complaint—Letter J. P. Yoder to iron and steel companies.....	12	12
Exhibit B-1 to bill of complaint—Letter J. P. Yoder to coal and coke companies.....	13	13
Exhibit C to bill of complaint—Blank form of Federal Trade Commission report for iron and steel industry....	13	13
Exhibit D to bill of complaint—Blank form of Federal Trade Commission report on cost, income, and tonnage of bituminous coal.....	35	35
Exhibit E to bill of complaint—Blank form of Federal Trade Commission report for coke industry.....	44	44
Exhibit D-1 to bill of complaint—Instructions for com- piling reports on costs, income, and tonnage of bitu- minous-coal industry.....	54	54
Exhibits F to F-6, inclusive, to bill of complaint—Letters from Federal Trade Commission to companies re report for iron and steel industry.....	60	60
Exhibits G to G-20, inclusive, to bill of complaint—Letters from Federal Trade Commission to companies re report for coal accounting and report for coke industry.....	63	63

II

Record from Supreme Court of the District of Columbia—	Contd.	Original.	Print.
Restraining order.....		76	76
Amended answer.....		77	77
Motion to strike amended answer.....		89	89
Memorandum on motion to strike, Bailey, J.....		95	95
Order making John F. Nugent part defendant.....		96	96
Answer of John F. Nugent, commissioner.....		96	96
Stipulations of Midvale Steel & Ordnance Co. and Cambria Steel Co.....		96	96
Stipulations as to other plaintiffs and defendants.....		97	97
Final decree.....		97	97
Memorandum opinion, Bailey, J.....		100	100
Opinion, Bailey, J., in case of Maynard Coal Co. v. Federal Trade Commission.....		100	100
Assignments of error.....		110	110
Designation of record.....		113	113
Clerk's certificate.....		114	114
Proceedings in Court of Appeals of the District of Columbia.....		115	115
Argument of cause.....		115	115
Opinion, Van Orsdel, J.....		116	115
Dissenting opinion, Smyth, C. J.....		120	126
Decree.....		123	126
Petition for appeal.....		124	127
Order allowing appeal.....		128	128
Memorandum as to bond.....		129	128
Citation and service.....		130	128
Assignment of errors.....		132	129
Designation of record.....		140	135
Clerk's certificate.....		143	136

Supreme Court of the District of Columbia.

CLAIRE FURNACE COMPANY, THE ELLA FURNACE Company, Reliance Coke Company, Westmoreland-Connellsville Coal & Coke Company, Weirton Steel Company, Edgewater Steel Company, La Belle Iron Works, Donner Steel Company, Steel & Tube Company of America, Midvale Steel & Ordnance Company, Cambria Steel Company, Republic Iron & Steel Company, McKeesport Tin Plate Company, N. & G. Taylor Company, Inland Steel Company, Trumbull Steel Company, Bethlehem Steel Company, The Youngstown Sheet & Tube Company, The Brier Hill Steel Company, West Penn Steel Company, Wheeling Steel & Iron Company, and Sharon Steel Hoop Company, complainants,

vs.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK, Huston Thompson, William B. Colver, Nelson B. Gaskell, and John Garland Pollard, members of and constituting the Federal Trade Commission, defendants.

In Equity, No. 37954.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the Supreme Court of the District of Columbia.

Filed June 12, 1920. Morgan H. Beach, Clerk.

CLAIRE FURNACE COMPANY, THE ELLA FURNACE Company, Reliance Coke Company, Westmoreland-Connellsville Coal & Coke Company, Weirton Steel Company, Edgewater Steel Company, La Belle Iron Works, Donner Steel Company, Steel & Tube Company of America, Midvale Steel & Ordnance Company, Cambria Steel Company, Republic Iron & Steel Company, McKeesport Tin Plate Company, N. & G. Taylor Company, Inland Steel Company, Trumbull Steel Company, Bethlehem Steel Company, The Youngstown Sheet & Tube Company, The Brier Hill Steel Company, West Penn Steel Company, Wheeling Steel & Iron Company, and Sharon Steel Hoop Company, complainants,

In equity. No. 37954.

vs.

FEDERAL TRADE COMMISSION AND VICTOR Murdock, Huston Thompson, William B. Colver, Nelson B. Gaskell, and John Garland Pollard, members of and constituting the Federal Trade Commission, defendants.

Bill of complaint.

1. The names of the complainants and the description thereof, respectively, are as follows:

Claire Furnace Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

The Ella Furnace Company, a corporation organized under and existing by virtue of the laws of the State of Ohio.

2 Reliance Coke Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

Westmoreland-Connellsville Coal & Coke Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

Weirton Steel Company, a corporation organized under and existing by virtue of the laws of the State of West Virginia.

Edgewater Steel Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

La Belle Iron Works, a corporation organized under and existing by virtue of the laws of the State of West Virginia.

Donner Steel Company, a corporation organized under and existing by virtue of the laws of the State of New York.

Steel & Tube Company of America, a corporation organized under and existing by virtue of the laws of the State of Delaware.

Midvale Steel & Ordnance Company, a corporation organized under and existing by virtue of the laws of the State of Delaware.

Cambria Steel Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

Republic Iron & Steel Company, a corporation organized under and existing by virtue of the laws of the State of New Jersey.

McKeesport Tin Plate Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

N. & G. Taylor Company, a corporation organized under and existing by virtue of the laws of the State of Maryland.

Inland Steel Company, a corporation organized under and existing by virtue of the laws of the State of Delaware.

Trumbull Steel Company, a corporation organized under and existing by virtue of the laws of the State of Ohio.

Bethlehem Steel Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

The Youngstown Sheet & Tube Company, a corporation organized under and existing by virtue of the laws of the State of Ohio.

The Brier Hill Steel Company, a corporation organized under and existing by virtue of the laws of the State of Ohio.

West Penn Steel Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

Wheeling Steel & Iron Company, a corporation organized under and existing by virtue of the laws of the State of West Virginia.

Sharon Steel Hoop Company, a corporation organized under and existing by virtue of the laws of the Commonwealth of Pennsylvania.

3. 2. Said complainants, and each one thereof, have an interest in the subject of this suit and in obtaining the relief herein prayed for. The questions to be determined in this suit are of common and general interest to said complainants. They join herein and bring this suit (on their own behalf, and on behalf of all others similarly situated, who may ask to be made parties hereto and to join herein) because of their interest in the subject of this suit, their desire to obtain the relief prayed for, their common and general interest in the questions to be determined herein, and also to avoid a multiplicity of suits which would have for their purpose the adjudication of the identical questions to determine which this suit is brought and to obtain the identical relief by each complainant respectively, which is prayed for by this Bill of Complaint.

3. The defendant, the Federal Trade Commission, is organized under, and exists by virtue of, an act of Congress of the United States, entitled "An act to create a Federal Trade Commission and to define its powers and duties and for other purposes," which was approved September 26, 1914. (Said act will be hereinafter referred to as the "Trade Commission Act.") The principal office of said Federal Trade Commission is in the District of Columbia, and it is a resident of said District. The other defendants, Victor Murdock, Huston Thompson, William B. Colver, Nelson B. Gaskell, and John Garland Pollard, are members of and constitute the said Federal Trade Commission and are assuming to act, in the premises hereinafter set forth, for and in the name of and on behalf of the said Federal Trade Commission.

4. The Federal Trade Commission, on or about the 15th day of December, 1919, adopted a resolution—a true and correct copy of which is hereto attached and marked Exhibit “A”—which recited that the Committee on Appropriations of the House of Representatives had requested it to suggest what it might do to reduce the high cost of living, and it had answered said committee, to obtain and publish information with respect to foodstuffs and other necessities, and particularly with respect to certain basic industries, including coal and steel; and after said recital it resolved that under section 6, paragraphs (a) and (b), of said trade commission act, it should at once proceed to the collection and publication of such information, and should obtain this information in order to publish the same with respect to the coal, steel, and their related industries; all of which will more fully and at large appear by reference to said Exhibit “A.”

5. Pursuant to the purposes expressed in said resolution, Exhibit “A,” and to carry out the same, the Federal Trade Commission about January 31, 1920, served upon complainants, and a large number of other corporations in the steel and coal industries, orders, true and correct copies whereof are hereto attached, marked Exhibits “B” and “B1.” Said orders required complainants and all others upon whom they were served to make monthly reports of the cost of production, to furnish financial balance sheets, and other information in great detail, upon a large variety of subjects, upon a prescribed form, containing questions of a most searching character, which, together with said orders, was served on complainants and a large number of others engaged in the same business and industries. Said form was accompanied by what was denominated “Instructions for compiling.” A true and correct copy of the form and instructions so served upon those complainants engaged in the steel industry is hereto attached, marked Exhibit “C,” and a true and correct copy of the form and instructions served upon those complainants engaged in the coal industry, is hereto attached, marked Exhibits “D” and “D1,” and a true and correct copy of the form and instructions so served upon those complainants engaged in the coke industry is hereto attached, marked Exhibit “E.” Said Exhibits “C” and “D” and “E” are hereinafter referred to as the “Questionnaires.”

6. Upon the failure of complainants to file answers to said questionnaires, the Federal Trade Commission served further orders and demands upon complainants, true and correct copies whereof are hereto attached and marked respectively Exhibits “F” to “F6” and “G” to “G20.”

7. As by reference to said orders and notices it will more fully and at large appear, the Federal Trade Commission called the attention of complainants to the fact that the trade commission act provides for penalties for delay or failure in the making of said reports, and impliedly threatened complainants with the imposition of said penalties, and still so threatens complainants.

8. Notwithstanding the fact that this court, in the case of Maynard Coal Company vs. Federal Trade Commission, No. 37659, In Equity, had adjudicated that the Federal Trade Commission was without power or authority under the trade commission act to require answers to said questionnaires, and in that suit enjoined it from demanding answers to said questionnaires, nevertheless it continues its demands for answers to said questionnaires upon complainants, and others en-

gaged in like industries, and said demands are made among other purposes to create the impression that the penalties provided by the trade commission act will be imposed unless said answers are made to said questionnaires, said demands, appearing in Exhibits "F" to "F6" and "G" to "G20," hereinbefore referred to and hereto attached.

9. The Federal Trade Commission, in issuing said order, Exhibit "B" and others, and demanding answers to said questionnaires, claims authority so to do solely and exclusively from section 6, paragraphs (a) and (b), of the trade commission act, which gives to it power to gather and compile information, in matters within its jurisdiction, concerning, and to investigate, "the organization, business, conduct, practices, and management of corporations engaged in commerce, and their relations to other corporations and to individuals, associations, and partnerships, and to require corporations engaged in commerce to file with the commission, in such form as the commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions furnishing the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships and individuals, of the respective corporations filing such reports"; and the Federal Trade Commission ordered answers to said questionnaires solely and only for the purpose of gathering and compiling said information for publication; and it makes no claim or allegation, nor is it the fact, that any complaint has been filed by or before it, nor has any charge or suggestions even been made that complainants, or any of them, have been or are guilty of any unfair method of competition, or have violated or failed to observe any of the provisions of the trade commission act, or of the act of Congress "to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, or the act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act. The information sought from the complainants and others engaged in the same industries by the filing of answers to said questionnaires is sought by the Federal Trade Commission for no other purpose connected with its powers than the alleged purpose, stated by it in its said resolution, Exhibit "A," because it claims that the information sought has some possible relevancy to the high cost of living and its effort to do something hereafter, with reference thereto; none of such information is in any way necessary, nor has it any relation whatsoever, however remote or indirect, to any regulation or control of interstate or foreign commerce, and it is not sought by the Federal Trade Commission for any purpose relating to any regulation of such commerce.

10. Complainants are engaged in producing, manufacturing, and making sales, in the States wherein their producing and manufacturing operations are conducted, and all of them are conducting mining operations or manufacturing plants, or both, and each one of complainants make sales of portions of its products, within the State where the same are produced.

A more particular description of the operations of said respective complainants is as follows, namely:

Claire Furnace Company: Manufacturing plants located in Pennsylvania, producing pig iron. About fifty per cent of its total production is sold in the State of Pennsylvania.

The Ella Furnace Company: Manufacturing plants located in Pennsylvania; produces pig iron; about eighty per cent of its total production is sold in the State of Pennsylvania.

Reliance Coke Company: Mining and manufacturing plants located in Pennsylvania; mines its coal and manufactures it into coke; total production is sold in the State of Pennsylvania.

Westmoreland-Connellsville Coal & Coke Company: Plants located in Pennsylvania; mines its own coal and manufactures it into coke; about twenty per cent of its total production is sold in the State of Pennsylvania.

Weirton Steel Company: Plants located in West Virginia; produces pig iron, tin plate, hot rolled strip steel, and cold rolled strip steel. A portion of its production is sold in West Virginia.

Edgewater Steel Company: Plants located in Pennsylvania, produces car wheels and locomotive tires. Approximately 35 per cent of its product is sold in Pennsylvania.

La Belle Iron Works: Manufacturing plants located in Ohio. Has mines in West Virginia, Pennsylvania, and Minnesota; mines coal and iron ore; manufactures coke, pig iron, billets, slabs, plate, sheets, pipe, and nails. Coal and iron ore are mined and coke is manufactured for the manufacturing plant of the corporation; manufactures billets and slabs, not for sale, but as one of the processes in the production of its finished products. A portion of its finished product is sold in the State where produced.

Donner Steel Company: Manufacturing plant located in the State of New York. Through subsidiaries mines ore in Minnesota for the use of its own plant, and mines coal and manufactures coke in Pennsylvania; produces pig iron, steel, ingots, blooms and billets, plates, bars, and bar products. Sells approximately 30 per cent of its production in the State of New York.

Steel & Tube Company of America: Has manufacturing plants in Illinois, Indiana, and Ohio. Manufactures iron and steel products; also manufactures and produces the greater portion of the ore, coal, and coke used in its manufacturing processes. About 50 per cent of its product in Illinois is sold in said State. A portion of the products of the Indiana and Ohio plants is sold in those States, respectively.

Midvale Steel & Ordnance Company: Manufacturing plants located in Pennsylvania; produces crude steel, semifinished steel, and lighter finished steel products. Sells approximately 30 per cent of its products in Pennsylvania.

Cambria Steel Company: Manufacturing plants located in Pennsylvania; manufactures iron and steel products. Approximately 30 per cent of its products is sold in the State of Pennsylvania.

Republic Iron & Steel Company: Principal manufacturing plant located in Ohio; manufactures pig iron; mines coal and iron ore and manufactures coke for its own use and produces iron and steel products, consisting of crude steel, semifinished steel and the lighter finished products, such as bars, tubes, bolts, terne buckles, &c. Approxi-

mately 30 per cent of its production is sold in the States where the same is produced.

McKeesport Tin Plate Company: Manufacturing plant located in the State of Pennsylvania. Produces tin plate. Sells a portion of its product in the State where produced.

6 N. & G. Taylor Company: Manufacturing plants located in Maryland. Produces semifinished steel and the lighter finished products, such as tin plate, terne plate, black sheets, &c. A portion of its product is sold in the State where produced.

Inland Steel Company: Manufacturing plants located in Indiana and Illinois, coal mining plants in Pennsylvania, and ore mines in Minnesota. Mines and produces the ore, coal, and coke for its own manufacturing processes. Produces crude steel, semifinished steel, and a large line of finished steel products. Sells a portion of its production in the States where produced.

Trumbull Steel Company: Manufacturing plant located in Ohio. Manufactures open-hearth steel, ingots, blooms, billets, slabs, sheet bars, sheets, terne plates, galvanized sheets, roofing products, tin plate, and hot and cold rolled steel strip. Sells about 30 per cent of its production in the State where produced.

Bethlehem Steel Company: Engaged in the general business of manufacturing iron and steel products, generally diversified. A large part of the ore and coal which Bethlehem Steel Company uses is mined and produced by subsidiary and affiliated companies, which have mines in Minnesota, Pennsylvania, West Virginia, Cuba, and Chile. It produces coke at some of its own plants for use in such plants. Its plants are located in the States of Pennsylvania and Maryland, in which States it sells a portion of its product.

The Youngstown Sheet & Tube Company: Plants located in the State of Ohio. It produces through subsidiary companies ore, coal, and coke. It sells about 25 per cent of its products in the State where produced.

The Brier Hill Steel Company: Manufactures iron and steel products and produces iron and steel products, coke, and its by-products. Its plants are located in the State of Ohio, and it produces through subsidiaries ore, coal, and coke. It sells over 25 per cent of its product in the State where produced.

West Penn Steel Company: Plant located in Pennsylvania. Manufactures sheet bars and sheets. Sells a portion of its product in the State of Pennsylvania.

Wheeling Steel & Iron Company: Manufacturing plants located in West Virginia and Ohio, and coal mines in the same States. Produces coal for its own use and manufactures and sells pig iron, slabs, billets, sheet and tin bars, skelp, pipe, and tin plate. The coal mined in West Virginia is used in part in the plants of the company located in Ohio. The pig iron produced in Ohio is used in plants of the company located in West Virginia. Part of product in West Virginia plants, such as tin bars, used in plants of the company in Ohio. Much of the product is sold and disposed of in the States where produced.

Sharon Steel Hoop Company: Manufacturing plants located in Pennsylvania and Ohio; produces pig iron, billets, sheets, hoops, and bands. Approximately 15 per cent of its total production sold in Pennsylvania and 15 per cent in Ohio.

11. The Federal Trade Commission has no power or authority, and no right, to demand from complainants answers to said questionnaires, or that they make said reports or any report such as that required under said instructions and notices hereinbefore referred to, for the following reasons, namely:

(a) The processes of manufacturing and production about which said questionnaires inquire, and upon which said questionnaires require reports to be made, are not "commerce" within the definition of the trade commission act, or of the Constitution of the United States, or the acts of Congress passed in pursuance thereof.

7 (b) Said orders and said questionnaires in effect practically prescribe the form and manner in which complainants shall keep their books of account, which manner and form differ from any of those now used by any of said complainants.

(c) Said orders and said questionnaires require complainants to furnish information not provided for by the trade commission act, and not relating to the "organization, business, conduct, practices, management, and relation to other corporations, partnerships and individuals," but goes far beyond this.

(d) Said orders and said questionnaires require from complainants neither "an annual or special, or both annual and special, report, or answers in writing to specific questions," but require of complainants a regular monthly report.

(e) Said orders and questionnaires provide for the inspection of the books and accounts of complainants, for the purpose of checking the reports so ordered, with the entries in said books of complainants. The Federal Trade Commission has no such power under the trade commission act, except when and if the party so required to report is being investigated or proceeded against, as provided in section 9 of the trade commission act.

(f) Said orders and said questionnaires would not be justified or authorized unless the Federal Trade Commission had general visitorial power of complainants, which visitorial power the trade commission act does not purport to give.

(g) The purpose declared by the Federal Trade Commission for which it has issued said orders and questionnaires, is such as is not authorized by law, nor are said orders and questionnaires calculated to effectuate even the purpose declared, and even if the same was authorized by law, said orders and questionnaires would accomplish, or tend to accomplish, no useful purpose recognized by law.

(h) Said orders and said questionnaires, and the action of the Federal Trade Commission in demanding answers thereto and compliance therewith, are an unauthorized and unwarranted usurpation of power, and an intrusion upon the private affairs, private business and private rights of complainants; and if the Federal Trade Commission, in accordance with its announced purpose in demanding compliance with said orders and answers to said questionnaires, makes public the information thereby obtained, it will result in disclosing to the public the secrets of the business and take away the property rights of complainants in their processes, organization and methods, which are of great value to complainants.

(i) The announced purpose of said commission to collect and make public the information sought to be obtained by said orders and ques-

tionnaires, with reference to the iron, steel, and coal industries, for the general information of the public, is such a purpose as is not recognized by law, and for the accomplishment of which there is no authority given it by the trade commission act.

(j) To so keep the books and accounts of complainants as to be able to make correct answers to said questionnaires in accordance with said orders, and to prepare said answers monthly, would entail upon said complainants an enormous expense, not contemplated, warranted, or authorized by the trade commission act, nor calculated to serve any useful purpose for which the trade commission act was passed, or for which the Congress of the United States had any power to pass the same. The forms prescribed by such questionnaires would merely increase the expense of keeping books and require the employment of extra bookkeepers, without any advantage to the complainants either by rendering their records more valuable for the purposes of their business, or enabling them to keep in any closer touch with their operations. The various subdivisions prescribed by said questionnaires are too vague and indeterminate to admit of accurate compliance therewith.

8 12. The construction placed upon the trade commission act by the Federal Trade Commission, in issuing said orders and said questionnaires, and demanding compliance therewith and answers thereto, makes the trade commission act unconstitutional, illegal, and void, for the reasons following, namely:

(a) It is a regulation of property and business wholly intrastate, and not interstate as defined by the Constitution of the United States, nor "commerce" as defined in the trade commission act.

(b) The production of coal, or coke, or kindred products, and of iron and steel, and related products as conducted by complainants is intrastate business, beyond the power of Congress to regulate, and any attempt to regulate the same would be in violation of the Constitution of the United States, and particularly the tenth amendment thereto.

(c) Complainants have the right of privacy as to their books of account, papers, contracts, and transactions, and the Congress of the United States has no power under the Constitution, through the Federal Trade Commission, or any other agency, to require complainants to report for publication the information contained in said books of account, papers, contracts, and transactions, and so to do would be particularly in violation of the fourth amendment to the Constitution of the United States, which protects against unreasonable search and seizure.

(d) Compliance by complainants with said orders and answers to said questionnaires, will subject them to unnecessary expense and loss in the preparation of said reports, and making provision therefor in their systems of accounts, and will deprive complainants of their property without due process of law, and without just compensation, in violation of the Constitution of the United States, and particularly the fifth amendment thereto.

13. The trade commission act does not purport to give to the Federal Trade Commission the power and authority which it seeks to exercise by said orders and said questionnaires, and if said trade commission act did attempt to give any such power or authority, the same

would be unconstitutional, illegal, and void, because the Congress of the United States would have no power and authority to vest in the Federal Trade Commission any such power or authority.

14. Complainants aver that the Federal Trade Commission intends to proceed against complainants, or some of them, either by actions for writs of mandamus, or by the imposition of penalties, or possibly both, because of the failure and refusal of complainants to comply with said orders and make answers to said questionnaires, and its proposed action would result in a large number of actions, all raising substantially the same questions as are raised by this Bill of Complaint, or would, if the penalties were imposed, result in perhaps the imposition of penalties each month aggregating against the party against which the penalties were imposed hundreds if not thousands of dollars per day. When and if the Federal Trade Commission makes answer hereto, all of the necessary legal questions can be raised and speedily determined, and a multiplicity of suits, the imposition of penalties, and great cost, loss, and expense to all parties concerned can be avoided. Complainants, by reason of the premises have no adequate remedy at law, and only by the interposition of this court, and the granting of the relief herein prayed, can complainants avoid a multiplicity of suits, and the imposition of penalties, secure the relief to which they are entitled, prevent the imposition of wrong and oppression, and forestall the exercise by the Federal Trade Commission of powers it does not possess, to the great and irreparable damage, cost, loss, wrong, and injury of complainants.

9 Wherefore complainants pray:

FIRST. That a temporary injunction, or interlocutory order, may be granted, restraining and enjoining said Federal Trade Commission, its members, agents, assistants, deputies, employes and attorneys, from taking any steps, or instituting any suits, or causing the same to be taken or instituted, or any proceedings of any kind, to compel compliance with said orders or to require answers to said questionnaires.

SECOND. Upon the final hearing of this suit, that a decree may be entered herein enjoining and restraining said Federal Trade Commission, its members, agents, assistants, deputies, employes and attorneys from the enforcement of said orders, and from requiring answers to said questionnaires, and from taking any proceedings whatever with reference to the enforcement of compliance with said orders and answers to said questionnaires.

THIRD. That such other and further orders and decrees may be entered herein and such relief granted as in the premises and in equity and good conscience may be required, whether herein specifically prayed for or not.

FOURTH. That a writ of subpoena of the United States of America may issue, directed to said Federal Trade Commission, commanding it on a certain day, and under certain penalty therein to be specified, personally to be and appear before this honorable Court, and then and there full, true, and complete answer make to all and singular the matters aforesaid, but not under oath, answer under oath being hereby expressly waived, and to stand to and abide by such order and

decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

A. LEO WEIL, WEIL AND THORP,
LEN COOK,
COOKE AND BINNEMANN,
Solicitors for Complainants.

SCOTT, BANCROFT, MARTIN & STEPHENS,
CHADEBOURNE, BARRETT & WALLACE,
RICHARD JONES, JR.,
DOUGLASS, FIFE & YOUNG,
MAYER, MEYER, AUSTRIAN & PLATT,
HARRINGTON, DEFORD, HEIM & HUXLEY,
CRAVATH & HENDERSON AND PAUL D. CRAVATH,
HINE, KENNEDY, MANCHESTER, CONROY & FORD,
W. W. FORD,
ALTER, WRIGHT & BARRON,
JAMES P. WHITLA,
A. LEO WEIL,
CHARLES M. THORP,
Of Counsel.

10 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

E. T. Weir, being duly sworn according to law, deposes and says that he is president of the Weirton Steel Company, one of the complainants above named; that he is, and for many years has been, familiar with the iron, steel, and coal industries, and has a general knowledge of the business and operations of all of said complainants; that the statements of fact in the foregoing bill of complaint are true, and the averments of law he is informed by counsel, and believes the same to be true; and further saith not.

E. T. WEIR.

Sworn to and subscribed before me this 11th day of June, A. D. 1920.

B. M. WARDEN,
Notary Public.

(My commission expires end next session of Senate.)

[SEAL.]

11 *Exhibit "A."*

Resolution of Federal Trade Commission.

"Whereas at a hearing held by the Committee on Appropriations of the House of Representatives on August 25th, 1919, the Federal Trade Commission was requested to suggest what it might undertake to do to reduce the high cost of living; and

"Whereas the commission recommended to the said committee that it would be desirable to obtain and publish from time to time current information with respect to the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and

wholesale and retail prices,' and particularly with respect to various basic industries, including coal and steel; and

"Whereas the said committee recommended an appropriation of \$150,000 for the current fiscal year for the said commission in consequence of this recommendation and the same was duly made by authority of Congress, and made available on November 4, 1919: Now therefore, be it

"*Resolved*, That the Federal Trade Commission by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission act, proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit: And be it further

"*Resolved*, That such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke, and pig iron industries."

12

Exhibit "B."

(Iron and steel companies.)

GENTLEMEN:

The Federal Trade Commission, pursuant to a resolution adopted on December 15, 1919, under the powers conferred upon it in section 6, paragraphs (a) and (b), of the Federal Trade Commission act, approved September 26, 1914, and in consideration of a special appropriation by Congress for such purposes, requires your company to report your monthly costs of production for the several products designated and other data as specified, in the form prescribed in the enclosed schedule, a duplicate of which is enclosed for your files.

Said reports, except as to balance sheet and income statement, are required monthly for each month of the calendar year 1920, and until further notice is given you, and are required to be mailed not later than the twenty-fifth day of the month succeeding the month for which the report is made. The cost sheets should be sent in as soon as prepared, even if the monthly report has not been completed. The report as to balance sheet is required as of the close of business December 31, 1919, or as of the close of your last fiscal year, with the first monthly report, namely, for January, 1920. Detailed income statement for the year ended December 31, 1919, or for your last fiscal year, is likewise required with the first monthly report. For each succeeding quarter a similar income statement is required with the cost report for the month following the closing date of the period; if the annual income statement referred to above does not close with the calendar year, quarterly reports for any intervening quarters in 1919 are also required.

The purpose of this report is to compile in combined or consolidated form the data received from individual companies and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry both for the benefit of the industry and of the public.

By direction of the commission.

J. P. YODER,
Secretary.

Exhibit "B1."

(Coal and coke companies.)

GENTLEMEN:

The Federal Trade Commission, pursuant to a resolution adopted on December 15, 1919, under the powers conferred upon it in section 6, paragraphs (a) and (b), of the Federal Trade Commission act, approved September 26, 1914, and in consideration of a special appropriation by Congress for such purposes, requires your company to report your monthly costs of production and other data as specified, in the form prescribed, in the enclosed schedule and instructions relating thereto.

Said report, except as to balance sheet, are required monthly for each month of the calendar year 1920, and until further notice is given you, and are required to be mailed not later than the twentieth day of the month succeeding the month for which the report is made; the report as to balance sheet is required as of the close of business December 31, 1919, or as of the close of your last fiscal year.

If the mines are operated by you in more than one field or district, a separate cost report is required for each field or district. A separate cost report may be filed for each mine, if you so elect, provided that you file also a composite cost report for each field or district.

Your attention is called to the fact that the above-mentioned law provides penalties for delay or failure in the making of reports to the commission or for making false reports.

By direction of the commission.

J. P. YODER, *Secretary.*

14 Form I. S.
F. T. C. *Exhibit "C."*

F. T. C. File No.

Federal Trade Commission report for iron and steel industry.

(Full name of reporting company.)

(Address of principal office.)

....., 19.....
(Month.)

Notice.

Attention is directed to the following extract from "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914:

"That the commission shall also have power * * *

"Section 6 (b). To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers

subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. * * *

"Section 10. * * * Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this act, or who shall wilfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporations, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than 3 years, or to both such fine and imprisonment.

"If any corporation required by this act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for 30 days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure. * * *

Certification.

Iron and Steel Industry report of _____
(Name of company.)

for the month of _____, 1919.

Approved and certified correct:

To be signed by an official of the company. _____
(Name and title of officer.)

Date _____, 19____.

16
(Full name of reporting company.)

F. T. C. File No.

Month of 19....

.....
(Address of principal office.)*I. Production.*

With respect to specified products, give, by plants, the total quantity produced during the month, designating unit of quantity in each case in the form below. If sufficient space is not provided attach securely additional sheets showing information as provided by the form. For any unusual change in quantity an explanation should be attached.

Name of product.	Unit.*	Quantity.			Plant.	
					Name.	Location.
Coke, bee hive						
Coke, by-product						
Pig iron, basic						
Pig iron, Bessemer						
Pig iron, foundry						
Spiegleisen						
Ferromanganese						
Pig iron, all other						
Ingots, O. H., basic**						
Ingots, O. H., acid						
Ingots, Bessemer						
Ingots, all other						
Blooms						
Slabs						

* Distinguish gross from net tons.

** Includes Duplex.

(Schedule continued on next page.)

F. T. C. File No.

17 Month of 19....
(Full name of reporting company.)

I. Production (continued).

Name of product.	Unit.*	Quantity.			Plant.	
					Name.	Location.
Billets, large						
Billets, small						
Sheet and tin plate bars						
Rails, standard, heavy, O. H.						
Rails, standard, heavy, Bessemer						
Rails, light						
Structural shapes, heavy						
Structural shapes, light						
Plates, sheared						
Plates, universal						
Skelp, iron						
Skelp, steel						
Merchant bars, steel						
Merchant bars, iron						
Hoops, bands, and cot- ton ties						
Strip steel						
Butt weld black tubes, iron						
Butt weld black tubes, steel						

* Distinguish gross from net tons.

(Schedule continued on next page.)

18

F. T. C. File No.

Month of 19....

(Full name of reporting company.)

I. Production (concluded).

Name of product.	Unit.*	Quantity.			Plant.	
					Name.	Location.
Lap weld black tubes, steel						
Lap weld black tubes, iron						
Seamless tubes						
Black sheets (all kinds)						
Galvanized sheets						
Black plate						
Tin plate						
Wire rods						
Bright wire						
Galvanized wire						
Barbed wire						
Wire nails						
Cut nails						

*Distinguish gross from net tons.

18 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

19
(Full name of reporting company.)

F. T. C. File No.....

.....
(Address of principal office.)

Month of.....19....

II. Costs.

With respect to the products specified below, furnish copies of company's monthly cost sheets for each battery of ovens, furnace, mill or other type of operation. All cost sheets should be clearly marked to indicate the company and the period to which they relate, the nature and grade of the product, the location of the oven, furnace, mill or other operation. For any unusual costs per unit on the cost sheets submitted an explanation should be attached.

In schedule below show the name of each plant, also the number of cost sheets submitted to cover the operations of each plant for the products listed therein. If sufficient space is not provided in the form, attach securely additional sheets showing information as provided by the form.

N. B. The cost sheets should be sent in as soon as prepared, even if the monthly report has not been completed.

Name of product.	Name of plant.	Number of cost sheets submitted for each plant.
Coke, beehive		
Coke, by-product		
Pig iron, basic		
Pig iron, Bessemer		
Pig iron, foundry		
Ingots, open hearth		
Ingots, Bessemer		
Blooms, open hearth		
Blooms, Bessemer		
Slabs, open hearth		
Slabs, Bessemer		

(Schedule concluded on next page)

(Full name of reporting company.)

II. Costs (concluded).

Name of product.	Name of plant.	Number of cost sheets submitted for each plant.
Billets, large, O. H.		
Billets, large, Bessemer.		
Billets, small, O. H.		
Billets, small, Bessemer.		
Sheet bars.		
Structural shapes, heavy.		
Plates, sheared.		
Plates, universal.		
Rails, standard heavy, open hearth.		
Rails, standard heavy, Bessemer.		
Merchant bars, steel.		
Merchant bars, iron.		
Tin plate.		
Wire rods.		

21 F. C. T. File No.
(Full name of reporting company.)..... Month of 1920.
(Address of principal office.)*III. Sales prices.*

By sales prices is meant the actual realization f. o. b. mill, after deduction of freight allowances made to purchasers. Return to be made for each product specified below for domestic and export shipments separately; it will be sufficient to show data for 80 per cent of the quantity of said shipments of each product specified, provided that only the smallest shipments are the ones omitted and the percentage reported is stated. For any unusual realization an explanation should be attached.

(A) Domestic Shipments (Exclusive of intercompany or interdepartment transfers).

Name of product.	Unit.*	Quantity.			Value (omit cents).		Average realization per unit.		Per- centage reported.
					\$		\$	c	
Pig iron, basic.									
Pig iron, Bessemer.									
Pig iron, foundry.									
Billets, large, O. H.									
Billets, large, Bessemer.									
Billets, small, O. H.									
Billets, small, Bessemer.									

* Distinguish gross from net tons.

(Schedule continued on next page.)

(Full name of reporting company.)

III. Sales prices (continued).

(A) Domestic shipments (exclusive of inter-company or inter-department transfers) (concluded).

Name of product.	Unit.*	Quantity.			Value (omit cents).	Average realiza- tion per unit.		Percent- age re- ported.
Sheet bars					\$		\$ c	
Plates, sheared								
Plates, universal								
Rails, standard O. H.								
Rails, standard Bessemer								
Structural shapes, heavy								
Structural shapes, light								
Merchant bars, steel								
Merchant bars, iron								
Black sheets								
Tin plate								
Wire rods								

* Distinguish gross from net tons.

(Schedule concluded on next page.)

23

F. T. C. File No.

Month of1920

(Full name of reporting company.)

III. Sales prices (concluded).

(B) Export Shipments (exclusive of inter-company or inter-department transfers).

Name of product.	Unit.*	Quantity.			Value (omit cents).	Average realiza- tion per unit.		Percent- age re- ported.
					\$	\$	c	
Pig iron, basic								
Pig iron, Bessemer								
Pig iron, foundry								
Billets, large, O. H.								
Billets, large, Bessemer								
Billets, small, O. H.								
Billets, small, Bessemer								
Sheet bars								
Plates, sheared								
Plates, universal								
Rails, standard heavy, O. H.								
Rails, standard heavy, Bessemer								
Structural shapes, heavy								
Structural shapes, light								
Merchant bars, steel								
Merchant Bars, iron								
Black sheets								
Tin plate								
Wire rods								

* Distinguish gross from net tons.

24

F. T. C. File No.

(Full name of reporting company.)

Month of 19....

(Address of principal office.)

IV. Contract prices

By contract price is meant the base price less freight allowances to be paid by purchasers and to be deducted from invoices. The term "Contracts" is intended to cover all agreements for the sale of specified commodities whether by formal written agreements or orders booked (exclusive of intercompany contracts with subsidiary companies and interdepartment transfers). Return to be made for each product specified below for domestic and export contracts separately; it will be sufficient to show data for 80 per cent of the quantity of said contracts of each product specified, provided that only the smallest contracts are the ones omitted, and the percentage reported is stated. For any unusual prices an explanation should be attached.

(a) Domestic sales contracts entered into during month.

Name of product.	Unit.*	Quantity.			Amount (omit cents).		Average price base size per unit.			Percent- age reported.	
					\$		\$		c		
Pig iron, basic											
Pig iron, Bessemer											
Pig iron, foundry											
Billets, large, O. H.											
Billets, large, Bessemer											
Billets, small, O. H.											
Billets, small, Bessemer											
Sheet bars											
Plates, sheared											

* Distinguish gross from net tons.

(Schedule continued on next page.)

(Full name of reporting company.)

IV. Contract prices (continued).

(a) Domestic sales contracts entered into during month (concluded).

Name of product.	Unit.*	Quantity.			Amount (omit cents).			Average price base size per unit.			Percent- age reported.
					\$			\$		c	
Plates, universal											
Rails, standard heavy, O. H.											
Rails, standard heavy, Bess.											
Structural shapes, heavy											
Structural shapes, light											
Merchant bars, steel											
Merchant bars, iron											
Black sheets											
Tin plate											
Wire rods											

* Distinguish gross from net tons.

(Schedule concluded on next page.)

26

F. T. C. File No.....

Month of.....19..

.....
(Full name of reporting company.)

IV. Contract prices (concluded).

(b) Export sales contracts entered into during month.

Name of product.	Unit.*	Quantity.				Amount (omit cents).			Average price base size per unit.			Percent- age reported.	
Pig iron, basic						\$			\$		c		
Pig iron, Bessemer													
Pig iron, foundry													
Billets, large, O. H.													
Billets, large, Bessemer													
Billets, small, O. H.													
Billets, small, Bessemer													
Sheet bars													
Plates, sheared													
Plates, universal													
Rails, standard, heavy, O. H.													
Rails, standard, heavy, Bess.													
Structural shapes, heavy													
Structural shapes, light													
Merchant bars, steel													
Merchant bars, iron													
Black sheets													
Tin plate													
Wire rods													

* Distinguish gross from net tons.

27

F. T. C. File No.

Month of 19..

.....
(Full name of reporting company.).....
(Address of principal office.)*V. Capacity of oven, furnaces, works, and mills.*

With respect to kinds of ovens, furnaces, works, and mills specified below state estimated annual capacity, in terms of product, as of January 1, 1920, in the January, 1920, report, and in case any change occurs therein during subsequent months report same in the report for the month during which the change occurred, otherwise enter on schedule "no change." By estimated annual capacity is meant the quantity of the product which the plant equipment in question could produce if run under normal conditions of operation full time, less average time necessary for repairs, etc. If sufficient space is not provided in form below attach securely additional sheets showing information as provided by the form.

Plant.			Estimated annual capacity.			Unit.*
Kind.	Name.	Location.				
Bee hive ovens						
By-product ovens						
Blast furnaces						
Bessemer converters						
O. H. steel furnaces						
Rail mills						
Blooming, large billet or slabbing mills						
Shape mills						
Small billet and sheet bar mills						
Sheared plate mills						
Universal plate mills						
Merchant bar mills						
Wire rod mills						
Wire drawing mills						
Black sheet mills, hot						
Sheet and black plate mills, hot						
Tinning mills						
Tube mills						

* Distinguish gross from net tons.

28

F. T. C. File No.

(Full name of reporting company.)

Month of 19...

(Address of principal office.)

VI. Orders.

For products specified in schedule below state the quantities of orders booked during the month and the quantities of unfilled orders outstanding at the end of the month. Entries in column "Quantities booked during the month" should not include inter-company orders to or from subsidiary companies.

Name of product.	Unit.*	Quantities booked during month.			Unfilled orders at end of month.		
Pig iron, basic							
Pig iron, Bessemer							
Pig iron, foundry							
Billets, large, O. H.							
Billets, large, Bessemer							
Billets, small, O. H.							
Billets, small, Bessemer							
Sheet bars							
Plates, sheared							
Plates, universal							
Rails, standard, heavy, O. H.							
Rails, standard, heavy, Bessemer							
Structural shapes, heavy							
Structural shapes, light							
Merchant bars, steel							
Merchant bars, iron							
Sheets, all kinds							
Tin plate							
Wire rods							

* Distinguish gross from net tons.

29 F. T. C. File No.
(Full name of reporting company.)..... Month of 19...
(Address of principal office.)*VII. Depreciation and general administrative and selling expenses.*

If you have made any estimate or actual allocation between products of depreciation or of general administrative and selling expenses (other than that included on your cost sheets) show below the rates per unit so estimated or used for the products specified.

Name of products.	Unit.*	Deprecia- tion.		General admin. & selling expenses.		Indicate whether actual or estimate.
		\$	c	\$	c	
Pig iron						
Billets, large, open hearth						
Billets, large, Bessemer						
Billets, small, open hearth						
Billets, small, Bessemer						
Sheet bars						
Plates, sheared						
Plates, universal						
Rails, standard, heavy, O. H.						
Rails, standard, heavy, Bessemer						
Structural shapes, heavy						
Structural shapes, light						
Merchant bars, steel						
Merchant bars, iron						
Black sheets						
Tin plate						
Wire rods						

* Distinguish gross from net tons.

30

..... F. T. C. File No.
(Full name of reporting company.)
..... Month of19..
(Address of principal office.)

VIII. Income statement.

Period.....

Item.	Detail.				Total.			
Sales	XXXXX	XXXXX	XXXXX	XXXXX				
Cost of sales (see note below)					XXXXX	XXXXX	XXXXX	XXXXX
Depreciation, general and administrative and selling expenses (not included in cost of sales.)					XXXXX	XXXXX	XXXXX	XXXXX
	XXXXX	XXXXX	XXXXX	XXXXX				
Net income from operations	XXXXX	XXXXX	XXXXX	XXXXX				
Income from other sources (Schedule 1)	XXXXX	XXXXX	XXXXX	XXXXX				
Total net income	XXXXX	XXXXX	XXXXX	XXXXX				
Deductions from net income (Schedule 2)	XXXXX	XXXXX	XXXXX	XXXXX				
Balance of net income transferred to surplus	XXXXX	XXXXX	XXXXX	XXXXX				

NOTE.—There shall not be included in cost of sales any of the following items, which are to be reported elsewhere: Federal income and excess profits taxes, interest on bonds, interest on notes, sinking fund provisions, discounts on bonds and notes, losses on investments, amortization of excess cost of construction, losses on contracts, reorganization expense, fire losses, donations (exclusive of welfare work), adjustments of property values, bonuses to officers.

33 F. T. C. File No.
 (Full name of reporting company.)
 Month of 19....
 (Address of principal office.)

IX. Balance sheet as at

19

Assets.	Detail.				Total.			
Cash in bank and on hand					XXXXX	XXXXX	XXXXX	XXXXX
Accounts receivable—current					XXXXX	XXXXX	XXXXX	XXXXX
Notes receivable—current					XXXXX	XXXXX	XXXXX	XXXXX
Inventories					XXXXX	XXXXX	XXXXX	XXXXX
Sub-total of current assets					XXXXX	XXXXX	XXXXX	XXXXX
Less: Provision for doubtful accounts					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total current assets	XXXXX	XXXXX	XXXXX	XXXXX				
Insurance					XXXXX	XXXXX	XXXXX	XXXXX
Taxes					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total prepayments	XXXXX	XXXXX	XXXXX	XXXXX				
Notes and loans receivable					XXXXX	XXXXX	XXXXX	XXXXX
Stocks of affiliated or subsidiary companies					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total intercompany accounts	XXXXX	XXXXX	XXXXX	XXXXX				
Stocks and bonds of other companies					XXXXX	XXXXX	XXXXX	XXXXX
Real estate not used in steel production					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total investments	XXXXX	XXXXX	XXXXX	XXXXX				
Mineral properties					XXXXX	XXXXX	XXXXX	XXXXX
Development and stripping in advance					XXXXX	XXXXX	XXXXX	XXXXX
Sub-total of fixed assets					XXXXX	XXXXX	XXXXX	XXXXX
Less: Depletion					XXXXX	XXXXX	XXXXX	XXXXX
Real estate and buildings					XXXXX	XXXXX	XXXXX	XXXXX
Machinery and equipment					XXXXX	XXXXX	XXXXX	XXXXX
Office furniture and fixtures					XXXXX	XXXXX	XXXXX	XXXXX
Sub-total of fixed assets					XXXXX	XXXXX	XXXXX	XXXXX
Less: Depreciation					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total fixed assets	XXXXX	XXXXX	XXXXX	XXXXX				
Good will, patents, etc.,	XXXXX	XXXXX	XXXXX	XXXXX				
	XXXXX	XXXXX	XXXXX	XXXXX				
	XXXXX	XXXXX	XXXXX	XXXXX				

34
 (Full name of reporting company.)

 (Address of principal office.)

F. T. C. File No.

Month of, 19...

IX. Balance sheet as at
 19

Liabilities.	Detail.				Total.			
Trade accounts payable					XXXXX	XXXXX	XXXXX	XXXX
Trade notes payable					XXXXX	XXXXX	XXXXX	XXXX
Wages accrued:					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total current liabilities	XXXXX	XXXXX	XXXXX	XXXXX				
Taxes					XXXXX	XXXXX	XXXXX	XXXX
Interest					XXXXX	XXXXX	XXXXX	XXXX
Unclaimed wages					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total accrued liabilities	XXXXX	XXXXX	XXXXX	XXXXX				
Notes and accounts payable					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total intercompany accounts	XXXXX	XXXXX	XXXXX	XXXXX				
Capital stock:								
Preferred shares					XXXXX	XXXXX	XXXXX	XXXX
Common shares					XXXXX	XXXXX	XXXXX	XXXX
	XXXXX	XXXXX	XXXXX	XXXXX				
Bonds								
Mortgages								
Loans and notes payable, bank or open account								
Appropriated surplus								
Surplus (Schedule I)								

State against item of inventories whether they are at cost and if not on what basis.
 State against each item of fixed assets whether the values are the cost of acquisition
 or value based on reappraisal.

Certified correct and in accordance with the books.

Name

.....
 (Title of officer.)

34 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL-

35
 (Full name of reporting company.)

 (Address of principal office.)

F. T. C. File No.....

Month of.....19...

Balance Sheet, Schedule 1.

	\$			c
Surplus at beginning of period				
Add—Credits made in 1919, applicable to prior periods				
Deduct—Charges made in 1919, applicable to prior periods				
Adjusted surplus as at beginning of period				
Add—Net income for year, 1919				
Deduct dividends				
Surplus at end of year as shown on balance sheet				

Exhibit "D."

State _____ Field _____ Filed No. _____

(Do not use. For F. T. C. only.)

Federal Trade Commission report on cost, income, and tonnage of semibituminous, bituminous, or subbituminous coal or lignite.

(Full name of reporting operator.)-----
(Address of principal office.)-----, 19____
(Month.)

Return all sheets of this form to the Federal Trade Commission.

Form C-51
F. T. C.*Notice.*

Attention is directed to the following extract from "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

"That the commission shall also have power * * *

"Section 6 (b). To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. * * *

"Section 10. * * * Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this act, or who shall wilfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporations, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than

\$1,000 nor more than \$5,000, or to imprisonment for a term of not more than 3 years, or to both such fine and imprisonment.

"If any corporation required by this act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for 30 days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure. * * *"

Certification.

Cost, income, and tonnage report of _____
(Name of operator.)
 for the month of _____ 19__
 approved and certified correct:
 To be signed by reporting operator. _____
(Name and title of officer.)
 Date _____ 19__.

Return all sheets of this form to the Federal Trade Commission. Do not fail to sign this sheet.

38 File No.
(Full name of reporting operator.)

Form C-51 Month of 19..
(Address of principal office.)

F. T. C.

Line No.	Accounts.	Amount.			Do not use (for F. T. C. only).		
		\$		c			
1	Labor:	*****	*****	*****	*****	*****	*****
2	Pick mining.....tons..						
3	Machine mining.....tons..						
4	Other operating labor.....						
5	Maintenance and repairs.....						
6	Mine office (clerks).....						
7	Superintendence, \$...engineering, \$....						
8						
9	Total labor.....						
10	Supplies (exclude power-house fuel):	*****	*****	*****	*****	*****	*****
11	Operating supplies.....						
12	Power purchased.....						
13	Maintenance and repairs.....						
14						
15	Total supplies.....						
16	Total operating cost (add lines 9 and 15).						
17	Net debits (in black) and credits (in red):	*****	*****	*****	*****	*****	*****
18	Supplies sold and miscellaneous revenue..						
19	Net operating cost (take line 16 and add or deduct line 18).....						
20	Fixed charges and general expenses:	*****	*****	*****	*****	*****	*****
21	Royalty.....tons @ \$.....per ton...						
22	Depletion.....tons @ \$.....per ton...						
23	Amortization—						
	(a) Development @ \$.....per ton...						
	(b) Stripping @ \$.....per ton...						
24	Depreciation.....						
	Fixed charges and general expenses carried forward.....						

Return all sheets of this form to the Federal Trade Commission.

38 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

39 File No.....
(Full name of reporting operator.)

Form C-51..... Month of.....19..
(Address of principal office.)

F. T. C.

Line No.	Accounts.	Amount.		(For F. T. C. only.)	
		\$	c		
25	Fixed charges and gen. expen. brought forward.....				
26	Officers' salaries.....				
27	Officers' expenses.....				
28	Office and clerical salaries.....				
29	General office expenses.....				
30	Taxes (except income and excess profits).....				
31	Insurance—General.....				
32	Insurance—Liability or compensation.....				
33				
34	Total fixed charges & general expenses.....				
35	Total mining cost (add lines 19 and 34).....				
36	Selling cost:.....	*****	*****	*****	*****
37	Officers' salaries, \$....., expenses, \$....				
38	Salesmen's salaries and expenses.....				
39	Commissions.....				
40	General sales office expenses.....				
41	Total selling cost.....				
42	Total mining & selling cost (add lines 35 and 41).....				

43 *Income statement.*

		\$	c		
44	Coal sales and transfers:.....	*****	*****	*****	*****
45	Commercial sales (line 75, column D)....				
46	Departmental transfers (line 75, column E).....				
47	Purchased coal sales (line 75, columns F. & G.).....				
48	Total sales and transfers.....				

Return all sheets of this form to the Federal Trade Commission.

FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL. 39

40 (Full name of reporting operator.) File No.
 Form C-51 Month of 19....
 F. T. C. (Address of principal office.)

Line No.	Accounts.	Amount.		Do not use (for F. T. C. only).		
		\$	c			
49	Cost of coal sold:	****	****	****	****	****
50	Mining and selling cost (line 42).....					
51	Coal inventory, deduct increase, add decrease (value shown on line 89).....					
52	Purchased coal cost.....					
53	Total cost of coal sold.....					
54	Profit from coal (subtract line 53 from line 48).....					
55	Miscellaneous income:	****	****	****	****	****
56	Net receipts from coke sales.....					
57	Royalty from owned or leased lands.....					
58	Interest and dividend.....					
59						
60	Total miscellaneous income.....					
61	Total income (add lines 54 and 60).....					
62	Deductions from income:	****	****	****	****	****
63	Taxes, income and excess profits.....					
64	Interest.....					
65						
66	Total deductions from income.....					
67	Net income (subtract line 66 from line 61).....					

REMARKS.
(For use of reporting operator.)

MEMORANDUM.
(For use of F. T. C. only.)

Return all sheets of this form to the Federal Trade Commission.

40 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

41 File No.
(Full name of reporting operator.)

Form C-51 Month of 19....
F. T. C. (Address of principal office.)

Do not include power-house fuel in any figures reported on this page.

COAL TONNAGE (net tons of 2,000 pounds. Do not report fractions of tons.)

Line No.	Grade of coal.	Sales of coal produced (exclude purchased coal).				Departmental transfers.	Purchased coal only.	
		(A) Local sales and coal to miners (tons).	(B) Sales to railroads (tons).	(C) Sales to other consumers (tons).	(D) Total commercial sales (add A, B, & C) (tons).	(E) Coal to coke ovens, own railroads, etc. (tons). ¹	(F) Sales to railroads (tons).	(G) Sales to other consumers (tons).
68.	Prepared.....							
69.	Run of mine.....							
70.	Slack.....							
71.	Total.....							

COAL SALES.

	\$	c	\$	c	\$	c	\$	c	\$	c	\$	c	\$	c
72.	Prepared.....													
73.	Run of mine.....													
74.	Slack.....													
75.	Total.....													

GENERAL INFORMATION.

Number or name of mine.	Number days worked.	Average number of men employed per day worked.		Total number of men on pay roll during month.		Location of mine.		Number or name of seam.	Average thickness of seam (inches).
		Miners.	Day men.	Miners.	Day men.	State.	County.		
76.....									
77.....									
78.....									
79.....									
80.....									
81.....									
82.....									

¹ Do not include power-house fuel.

Return all sheets of this form to the Federal Trade Commission.

42
(Full name of reporting operator.)

File No.

..... Month of 19....
(Address of principal office.)

Form C-51

F. T. C.

Coal tonnage statement (exclude purchased coal).

(All tonnage should be reported in net tons of 2,000 pounds. Do not report fractions of tons.)

Line No.	Tons.		Tons.	
83. Total sales (line 71, col. D).....			XXXXXXX	XXXXXXX
84. Departmental transfers (line 71, col. E).....			XXXXXXX	XXXXXXX
85. Coal in transit not invoiced (value, \$.....)			XXXXXXX	XXXXXXX
86. Total sales, transfers, and coal in transit not invoiced.....	XXXXXXX	XXXXXXX		
87. Coal stored at beginning of period (value, \$.....)			XXXXXXX	XXXXXXX
88. Coal stored at end of period (value, \$.....)			XXXXXXX	XXXXXXX
89. Increase (add) or decrease (deduct) (value, \$.....)	XXXXXXX	XXXXXXX		
90. Net production of coal (divisor) (take line 89 and add to or deduct from line 86).....	XXXXXXX	XXXXXXX		
91. Production tonnage (tipple weights).....	XXXXXXX	XXXXXXX		
92. Power-house fuel (value, \$.....)			XXXXXXX	XXXXXXX
93. Slate and other waste in preparation.....			XXXXXXX	XXXXXXX
94. Total coal and waste not realized on.....	XXXXXXX	XXXXXXX		
95. Net production of coal (subtract line 94 from line 91).....	XXXXXXX	XXXXXXX		

Return all sheets of this form to the Federal Trade Commission.

43 *Balance sheet as at* 19....

(Full name of reporting operator.)

File No.

(Address of principal office.)

Line No.	Assets.	Detail.			Total.			Do not use (for F. T. C. only).
		\$		c	\$		c	
101	Cash in bank and on hand....	XXXXX	XXXXX	XXXXX				
102	Accounts receivable—current....	XXXXX	XXXXX	XXXXX				
103	Notes receivable—current.....	XXXXX	XXXXX	XXXXX				
104	Inventories (a).....	XXXXX	XXXXX	XXXXX				
105	“ (b).....	XXXXX	XXXXX	XXXXX				
106	Subtotal of current assets.....	XXXXX	XXXXX	XXXXX				
107	Less reserve for doubtful accounts.....	XXXXX	XXXXX	XXXXX				
108	Total current assets.....	XXXXX	XXXXX	XXXXX				
109	Insurance paid in advance....	XXXXX	XXXXX	XXXXX				
110	Taxes paid in advance.....	XXXXX	XXXXX	XXXXX				
111	Royalties paid in advance.....	XXXXX	XXXXX	XXXXX				
112	Stripping done in advance....	XXXXX	XXXXX	XXXXX				
113		XXXXX	XXXXX	XXXXX				
114	Total deferred assets.....	XXXXX	XXXXX	XXXXX				
115	Intercompany (affiliated) accounts, notes, and loans receivable.....	XXXXX	XXXXX	XXXXX				
116	Stock of other companies.....	XXXXX	XXXXX	XXXXX				
117	Bonds of other companies.....	XXXXX	XXXXX	XXXXX				
118	Mortgages.....	XXXXX	XXXXX	XXXXX				
119	Real estate not used in coal production.....	XXXXX	XXXXX	XXXXX				
120		XXXXX	XXXXX	XXXXX				
121	Total investments.....	XXXXX	XXXXX	XXXXX				
122	Coal lands.....	XXXXX	XXXXX	XXXXX				
123	Surface lands.....	XXXXX	XXXXX	XXXXX				
124	Buildings.....	XXXXX	XXXXX	XXXXX				
125	Machinery and equipment.....	XXXXX	XXXXX	XXXXX				
126	Development charges.....	XXXXX	XXXXX	XXXXX				
127	Office furniture and fixtures..	XXXXX	XXXXX	XXXXX				
128	Subtotal of fixed assets.....	XXXXX	XXXXX	XXXXX				
129	Less reserves for depletion \$— and depreciation \$—	XXXXX	XXXXX	XXXXX				
130	Total fixed assets.....	XXXXX	XXXXX	XXXXX				
131	Good will.....	XXXXX	XXXXX	XXXXX				
132	Leaseholds.....	XXXXX	XXXXX	XXXXX				
133	Property rights.....	XXXXX	XXXXX	XXXXX				
134	Total assets.....	XXXXX	XXXXX	XXXXX				

Balance sheet as at _____ 19 .

File No. _____

(Full name of reporting operator.) _____

(Address of principal office.) _____

Line No.	Liabilities.	Detail.		Total.		Do not use (for F. T. C. only).		
		\$	c	\$	c			
135	Trade accounts payable.....			XXXXXXXXXX	XXXXX			
136	Trade notes payable.....			XXXXXXXXXX	XXXXX			
137	Wages accrued.....			XXXXXXXXXX	XXXXX			
138				XXXXXXXXXX	XXXXX			
139				XXXXXXXXXX	XXXXX			
140				XXXXXXXXXX	XXXXX			
141	Total current liabilities.....	XXXXXXXXXX	XXXXX					
142	Taxes.....			XXXXXXXXXX	XXXXX			
143	Interest.....			XXXXXXXXXX	XXXXX			
144	Unclaimed wages.....			XXXXXXXXXX	XXXXX			
145				XXXXXXXXXX	XXXXX			
146	Total accrued liabilities.....	XXXXXXXXXX	XXXXX					
147	Intercompany (affiliated) ac- counts, notes, and loans pay- able.....	XXXXXXXXXX	XXXXX					
148	Capital, s t o c k—preferred— shares.....	XXXXXXXXXX	XXXXX					
149	Capital, s t o c k—common— shares.....	XXXXXXXXXX	XXXXX					
150	Bonds— $\frac{\%}{\%}$	XXXXXXXXXX	XXXXX					
151	Mortgages— $\frac{\%}{\%}$	XXXXXXXXXX	XXXXX					
152	Loans and notes payable, bank or open accounts.....	XXXXXXXXXX	XXXXX					
153		XXXXXXXXXX	XXXXX					
154	Appropriated surplus.....	XXXXXXXXXX	XXXXX					
155	Dividends declared, not paid....	XXXXXXXXXX	XXXXX					
156		XXXXXXXXXX	XXXXX					
157	Surplus.....	XXXXXXXXXX	XXXXX					
158		XXXXXXXXXX	XXXXX					
159		XXXXXXXXXX	XXXXX					
160		XXXXXXXXXX	XXXXX					
161		XXXXXXXXXX	XXXXX					
162		XXXXXXXXXX	XXXXX					
163	Total liabilities.....	XXXXXXXXXX	XXXXX					

Balance sheet certified correct and in accordance with the books.

(Name.)

(Title of officer.)

Form I. S.
F. T. C.

Exhibit "E."

F. T. C. File No. _____

Federal Trade Commission report for coke industry.

(Full name of reporting company.)

(Address of principal office)

_____, 19____
(Month)

46

Notice.

Attention is directed to the following extract from "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914:

"That the commission shall also have power * * *

"Section 6 (b). To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. * * *

"Section 10. * * * Any person who shall wilfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this act, or who shall wilfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this act, or who shall wilfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporations, or who shall wilfully remove out of the jurisdiction of the United States, or wilfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall wilfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than 3 years, or to both such fine and imprisonment."

"If any corporation required by this act to file any annual or special report shall fail so to do within the time fixed by the commission

for filing the same, and such failure shall continue for 30 days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure. * * *

Certification.

Coke Industry report of _____
(Name of company.)
for the month of _____, 19____.

Approved and certified correct:
To be signed by an official of the company. _____
(Name and title of officer.)
Date _____, 19____.

48

F. T. C. File No.

(Full name of reporting company.)

Month of 19....

(Address of principal office.)

III. Sales prices.

By sales prices is meant the actual realization f. o. b. ovens. Return to be made for each product specified below; it will be sufficient to show data for 80 per cent of the quantity of said shipments of each product specified provided that only the smallest shipments are the ones omitted and the percentage reported is stated. For any unusual realization an explanation should be attached.

Name of product.	Quantity (net tons).			Value (omit cents).			Average realization per net ton.			Percent- age reported.
				\$			\$		c	
Shipments (exclusive of inter- company or interdepartment transfers):										
Coke, bee hive										
Coke, by-product										

IV. Contract prices.

By contract price is meant the price f. o. b. ovens. The term "Contract" is intended to cover all agreements for the sale of specified commodities whether by formal written agreements or orders booked (exclusive of intercompany contracts with subsidiary companies and interdepartment transfers). Return to be made for each product specified below; it will be sufficient to show data for 80 per cent of the quantity of said contracts of each product specified, provided that only the smallest contracts are the ones omitted, and the percentages reported is stated. For any unusual prices an explanation should be attached.

Name of product.	Quantity (net tons).			Value (omit cents).			Average price per net ton.			Percent- age reported.
				\$			\$		c	
Sales contracts entered into dur- ing month:										
Coke, bee hive										
Coke, by-product										

49
(Full name of reporting company.)

F. T. C. File No.

.....
(Address of principal office.)

Month of.....19....

V. Capacity of ovens.

With respect to kinds of ovens specified below state estimated annual capacity, in net tons, as of January 1, 1929, in the January report, and in case any change occurs therein during subsequent months report same in the report for the month during which the change occurred, otherwise enter on schedule "no change." By estimated annual capacity is meant the quantity of the product which the plant equipment in question could produce if run under normal conditions of operation full time, less average time necessary for repairs, etc. If sufficient space is not provided in form below attach securely additional sheets showing information as provided by the form.

Kind.	PLANT.		Estimated annual capacity (net tons).	
	Name.	Location.		
Bee-hive ovens				
By-product ovens				

VI. Orders.

For products specified in schedule below state the quantities of orders in net tons booked during the month and the quantities of unfilled orders outstanding at the end of the month. Entries in column "Quantities booked during month" should not include intercompany orders to or from subsidiary companies.

Name of product.	Quantities booked during month.			Unfilled orders at end of month.		
Coke, bee-hive						
Coke, by-product						

VII. Depreciation and general and administrative and selling expenses.

If you have made any estimate or actual allocation between products of depreciation or of general administrative and selling expenses (other than that included on your cost sheets) show below the rates so estimated or used for the products specified.

Name of product.	Depreciation (per net ton).			General admin. & selling expenses (per net ton).			Indicate whether actual or estimate.
Coke, bee-hive	\$		c	\$		c	
Coke, by-product							

50
(Full name of reporting company.)

F. T. C. File No.

.....
(Address of principal office.)

Month of 19

VIII. *Income statement.*

Period

Item.	Detail.				Total.			
	XXXX	XXXX	XXXX	XXXX				
Sales	XXXX	XXXX	XXXX	XXXX				
Cost of sales (see note below)					XXXX	XXXX	XXXX	XXXX
Depreciation, general and administrative and selling expenses (not included in cost of sales)					XXXX	XXXX	XXXX	XXXX
	XXXX	XXXX	XXXX	XXXX				
Net income from operations	XXXX	XXXX	XXXX	XXXX				
Income from other sources (Schedule 1)	XXXX	XXXX	XXXX	XXXX				
Total net income	XXXX	XXXX	XXXX	XXXX				
Deductions from net income (Schedule 2)	XXXX	XXXX	XXXX	XXXX				
Balance of net income transferred to surplus	XXXX	XXXX	XXXX	XXXX				

NOTE.—There shall not be included in cost of sales any of the following items, which are to be reported elsewhere: Federal income and excess profits taxes, interest on bonds, interest on notes, sinking fund provisions, discounts on bonds and notes, losses on investments, amortization of excess cost of construction, losses on contracts, reorganization expense, fire losses, donations (exclusive of welfare work), adjustments of property values, bonuses to officers.

52 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

53 F. T. C. File No.

(Full name of reporting company.)

Month of 19....

(Address of principal office.)

IX. Balance sheet as at

.....19

Assets.	Detail.				Total.			
Cash in bank and on hand					XXXXX	XXXXX	XXXXX	XXXX
Accounts receivable—current					XXXXX	XXXXX	XXXXX	XXXX
Notes receivable—current					XXXXX	XXXXX	XXXXX	XXXX
Inventories					XXXXX	XXXXX	XXXXX	XXXX
Subtotal of current assets					XXXXX	XXXXX	XXXXX	XXXX
Less: Provision for doubtful accounts					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total current assets	XXXXX	XXXXX	XXXXX	XXXX				
Insurance					XXXXX	XXXXX	XXXXX	XXXX
Taxes					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total prepayments	XXXXX	XXXXX	XXXXX	XXXX				
Notes and loans receivable					XXXXX	XXXXX	XXXXX	XXXX
Stocks of affiliated or subsidiary companies					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total intercompany accounts	XXXXX	XXXXX	XXXXX	XXXX				
Stocks and bonds of other companies					XXXXX	XXXXX	XXXXX	XXXX
Real estate not used in coal and coke production					XXXXX	XXXXX	XXXXX	XXXX
					XXXXX	XXXXX	XXXXX	XXXX
Total investments	XXXXX	XXXXX	XXXXX	XXXX				
Mineral properties					XXXXX	XXXXX	XXXXX	XXXX
Development and stripping in advance					XXXXX	XXXXX	XXXXX	XXXX
Subtotal of fixed assets					XXXXX	XXXXX	XXXXX	XXXX
Less: Depletion					XXXXX	XXXXX	XXXXX	XXXX
Real estate and buildings					XXXXX	XXXXX	XXXXX	XXXX
Machinery and equipment					XXXXX	XXXXX	XXXXX	XXXX
Office furniture and fixtures					XXXXX	XXXXX	XXXXX	XXXX
Subtotal of fixed assets					XXXXX	XXXXX	XXXXX	XXXX
Less: Depreciation					XXXXX	XXXXX	XXXXX	XXXX
Total fixed assets	XXXXX	XXXXX	XXXXX	XXXX				
Good will, patents, etc.	XXXXX	XXXXX	XXXXX	XXXX				
	XXXXX	XXXXX	XXXXX	XXXX				
Total	XXXXX	XXXXX	XXXXX	XXXX				

54 F. T. C. File No.
(Full name of reporting company.)
..... Month of 19....
(Address of principal office.)

IX. Balance sheet as at
..... 19

Liabilities.	Detail.				Total.			
Trade accounts payable					XXXXX	XXXXX	XXXXX	XXXXX
Trade notes payable					XXXXX	XXXXX	XXXXX	XXXXX
Wages accrued					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total current liabilities	XXXXX	XXXXX	XXXXX	XXXXX				
Taxes					XXXXX	XXXXX	XXXXX	XXXXX
Interest					XXXXX	XXXXX	XXXXX	XXXXX
Unclaimed wages					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total accrued liabilities	XX XXX	XXXXX	XXXXX	XXXXX				
Notes and accounts payable					XXXXX	XXXXX	XXXXX	XXXXX
					XXXXX	XXXXX	XXXXX	XXXXX
Total intercompany accounts	XXXXX	XXXXX	XXXXX	XXXXX				
Capital stock:								
Preferred shares					XXXXX	XXXXX	XXXXX	XXXXX
Common shares					XXXXX	XXXXX	XXXXX	XXXXX
	XXXXX	XXXXX	XXXXX	XXXXX				
Bonds								
Mortgages								
Loans and notes payable, bank or open account								
Appropriated surplus								
Surplus (Schedule 1)								
Total								

State against item of inventories whether they are at cost and if not on what basis.
State against each item of fixed assets whether the values are the cost of acquisition
or value based on reappraisal.
Certified correct and in accordance with the books.
Name.....
.....
(Title of officer.)

54 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

..... F. T. C. File No.
(Full name of reporting company.)

..... Month of 19..
(Address of principal office.)

Balance sheet, Schedule 1.

	\$			c
Surplus at beginning of period				
Add—Credits made in 1919, applicable to prior periods				
Deduct—Charges made in 1919, applicable to prior periods				
Adjusted surplus as at beginning of period				
Add—Net income for year, 1919				
Deduct dividends				
Surplus at end of year as shown on balance sheet				

56

Exhibit "D1."

Instructions for compiling semibituminous, bituminous, or subbituminous coal or lignite reports on cost, income, and tonnage.

Operators producing 12,000 net tons or over per annum shall file monthly reports.

All tonnage reported shall be on a net ton basis of 2,000 pounds. Fractional parts of tons are not to be shown, but should be adjusted to the nearest whole ton, so that the various items will add to the total shown.

The description of items to be charged to each account shall be closely followed. Any deviation from these instructions must be

fully explained. Your attention is directed to the fact that the total net income on line 67 shall agree with the figures shown in the profit-and-loss account of your books. If for any reason these figures do not agree, the difference shall be fully explained, so that the commission's agents can readily check the monthly reports into the general books.

OPERATING COSTS.

The several general accounts, viz, labor, supplies, net debits and credits to operating cost, fixed charges and general expenses and selling cost, are designed to show expenditures made in connection with the mining, preparation, and sale of coal or lignite. Revenue from and expenses of indirect or nonmining properties are not to be included on lines 1 to 42, inclusive. Such revenues and expenses shall be kept in separate accounts and the net income therefrom shown on lines 55 to 60, "Miscellaneous income."

LABOR.

The primary accounts under this general account shall include the expenditures made for labor employed in connection with the operation of the mine and the preparation facilities and in repairing mine structures and equipment. Labor costs for additions, betterments, improvements, and developments shall not be charged to these primary accounts. Deductions from pay roll, such as smithing, dwelling rents, and similar items shall be shown on line 18.

Lines 2 and 3. "Pick mining" shall include wages paid to pick miners, and "Machine mining" shall include wages paid to machine miners, who are paid only on a tonnage basis. The per ton rate for each method of mining should be shown on the respective lines. The wages paid to miners' helpers, shot firers, and loaders of room, pillar, and entry coal, whether paid by the car, ton, or day, as well as wages of other labor pertaining to the mining of coal, shall be included on line 4, "Other operating labor." This latter account shall also include the amounts paid for yardage, dead work, ventilation, drainage, timbering, haulage, removing stripped coal, washery, power house, and all labor in and around the mine not provided for in the other accounts under the head of labor.

Labor in connection with the washing or other special preparation of coal to be coked, or any other labor in connection with the manufacture of coke shall not be included here, but shall be charged to the coking operation.

Line 5. "Maintenance and repairs" shall include wages paid for maintaining and repairing mine structures, mining machinery and equipment, and miners' dwellings.

Line 6. "Mine office" shall include only the salaries paid clerks at the mines.

Line 7. "Superintendence and Engineering" shall include: (a) the salaries paid mine superintendents, mine foremen or bosses and their assistants, and (b) the salaries of fees paid mining engineers and assistants. Superintendence and engineering in connection with coking operations shall not be included here.

SUPPLIES.

Under this general account shall be included the cost of materials and supplies used during the month covered by the report in operating the mine and facilities, and in maintaining and repairing mine structures and equipment. Supplies used for additions, betterments, improvements, and developments shall not be charged to these primary accounts.

Line 11. "Operating supplies" shall include the cost of mine timbers, props, ties, etc.; feed, bedding, and other stable supplies; washery and power-house supplies; and general operating supplies not included in other supply accounts.

Line 12. "Power purchased" shall include the cost of power (electric, compressed air, gas, or steam) purchased and used for operating purposes. Power-house fuel is not to be included.

Line 13. "Maintenance and repairs" shall include the cost of supplies used during the month covered by the report in maintaining and repairing mine structures, mining machinery, and equipment; and miners' houses.

NET DEBTS AND CREDITS TO COST.

Line 18. "Supplies sold and miscellaneous revenue" shall include: (a) the net loss or gain from the sale of explosives, lamps, or other mine supplies sold to miners by the operator; (b) revenue from smithing; (c) revenue from heat, light, and power when the cost of producing same has been included in the labor and supply accounts; (d) rents received from houses and tenements occupied by miners or other employees at the mines; (e) debits or credits not otherwise provided for, which apply directly to operating costs.

FIXED CHARGES AND GENERAL EXPENSES.

Line 21. "Royalty" shall include royalty paid or accrued upon tonnage mined from leased lands. The charge shall be determined by multiplying the tonnage actually mined during the period reported by the rate per ton specified in such lease or leases. Any payment made at the time of entering into the lease, not by way of advanced royalty, shall be written off under the heading of depletion.

When the lease or royalty agreement contains a minimum provision and the tonnage mined during the period is below the minimum the difference between the royalty paid on a per ton basis and the minimum payment shall be charged to the deferred asset account "Royalties paid in advance." The subsequent accounting for such advanced royalty shall be as follows:

(1) If at a later date there is a recovery of coal for which royalty has been advanced, such recovered royalty shall be charged to this account at the per ton rate specified in the lease; or

(2) If the period during which the recovery may be made under the lease has expired, leaving a balance in the asset account against such lease, this unrecoverable royalty or balance shall be specified on line 33 at the expiration of such period.

NOTE.—No charge shall be made to this account for royalty paid on leases from which no coal has been mined by the reporting operator.

Line 22. "Depletion" shall apply only to the exhausting of a mineral deposit actually owned in fee by the operating company or to the writing off of the premium paid on acquisition of a leasehold. It should in all cases be the amount arrived at by dividing the actual amount paid for the property or leasehold, less the estimated cost of surface lands, by the estimated number of tons of recoverable coal contained in the property at the time of acquisition. Any revaluations of the property to determine a depletion rate for use in reports for other purposes shall not be used as the amount to be depleted in this report; actual cost, in all cases, being the amount to be used. The charge in any month shall be determined by multiplying the tonnage mined from the land owned in fee by the rate per ton obtained as above.

Line 23. "Amortization," (a) Development. The per ton rate for this account shall be obtained by dividing the cost to the present owner of driving the main tunnel, shaft, slope, or drift, plus the estimated cost of the number of feet of main tunnel to be driven, by the estimated tonnage recoverable through such development. The charge to this account in any month shall be determined by multiplying the tonnage obtained through this development by the per ton rate. (b) Stripping shall include corresponding debits to any credits to the deferred asset account, "Stripping done in advance." (See explanation under line 112, page 7, of these instructions.)

Line 24. "Depreciation" shall be charged with one-twelfth of the annual charge for depreciation of all mine buildings, dwellings, and equipment. This charge should be determined by dividing the original cost or purchase price, less salvage value, by the estimated service life of such buildings, dwellings, or equipment.

Do not calculate depreciation on the same basis as depletion which is only dependent on the estimated number of tons of recoverable coal.

NOTE.—When a mine building, dwelling, or unit of equipment is retired from service and replaced with property of a like purpose, the fixed asset account should be charged with the cost of the new property and credited with the book value of the property retired. Reserve for depreciation should be charged correspondingly with the book value. The difference between the amount of depreciation accrued with respect to this property (plus salvage value, less cost of removal or demolishing), and its book value should be charged to surplus.

Line 26. "Officers' salaries" shall include that part of the officers' salaries allocated to coal mining. Such portion of the salaries as is chargeable to selling expense should be shown on line 37. "Officers" should only include the president, vice president, treasurer, secretary, etc., who are elected and whose salaries are fixed under the by-laws or by the board of directors of the company.

Line 27. "Officers' expenses" shall include that part of the officers' expenses allocated to coal mining. Such portion of the expenses as is chargeable to selling expense should be shown on line 37.

Line 28. "Office and clerical salaries" shall include the salaries of clerks, bookkeepers, stenographers, and other employees in the general offices of the company.

Line 29. "General office expenses" shall include such items as stationery, printing, postage, telephone, telegrams, and other miscellaneous expenses applying to both the general office and the mine office.

Line 30. "Taxes" shall include a monthly charge of one-twelfth of the State, county, school, and other local taxes paid or accrued during the year on mining property, office buildings, and dwellings occupied by employees at the mines. No Federal income or excess-profits taxes shall be included in this account.

Line 31. "Insurance general" shall include a monthly charge of one-twelfth of the annual premiums paid for fire, boiler, or other general insurance on all property used for mining purposes.

Line 32. "Insurance liability or compensation" shall include payments or charges resulting from the operator's liability for accident to employees: (1) If liability insurance is carried with private companies or with the State, this account shall include the amount paid or accrued during the month; (2) if the company elects to bear its own risk and provides no reserve, the actual payments due to injuries to employees shall be charged to this account; (3) if the company elects to bear its own risk and provides a reserve, the rate used in determining the monthly charge to this account shall not exceed the rate specified by the State or by private insurance companies. Where a reserve is provided all payments due to injuries to employees shall not be charged to this account, but shall be charged to the reserve.

Expenses incurred in operating or maintaining company hospitals, salaries or fees of surgeons and physicians, and legal expenses arising from claims due to injuries to employees shall also be included in this account.

SELLING COST.

Line 37. "Officers' salaries and expenses" shall include that part of officers' salaries and expenses allocated to the sale of coal. The salaries and expenses shall be shown separately, as indicated.

Line 38. "Salesmen's salaries and expenses" shall include the salaries and expenses of salesmen engaged in selling coal. If the salesman is paid a specified salary and also receives additional bonuses or commissions on sales, such additional compensation shall also be included in this account.

Line 39. "Commissions" shall include only the commissions paid to brokers or jobbers for selling coal.

Line 40. "General sales office expenses" shall include the salaries of clerks, bookkeepers, and other employees in the general sales office. Expenditures for printing, stationery, etc., in connection with the sales office shall also be included in this account.

INCOME STATEMENT.

Line 45. "Commercial sales" shall include the revenue from produced coal sold locally and to miners, to railroads not owned by the

reporting operator, and to general consumers. The revenue shown here should check with that shown on line 75, column D, and should be the net amount after deducting (a) freight paid by the operator on coal shipped, (b) allowances on bills, and adjustments due to errors in billing coal.

Line 46. "Departmental transfers" shall include the value, as shown by the operator's books, of produced coal transferred to the operator's own coke ovens, railroads, steamboats, etc. Coal transferred at the cost of production to an affiliated or subsidiary company operated by the producer (for example, lime kiln, cement plant, glass works, etc.) shall also be included. Coal transferred to the power house shall not be included.

Line 47. "Purchased coal sales" shall include the revenue from sales of purchased coal.

COST OF COAL SOLD.

Line 51. "Coal inventory." On this line insert the increase or decrease which has taken place between the inventory value of coal on hand at the close of the month and that at the beginning of the month. This amount should check with the value shown on line 89, sheet 5.

MISCELLANEOUS INCOME.

Line 56. "Net receipts from coke sales" shall consist of revenues from coke sales less the costs of operating the coke ovens. The net income only shall be shown.

Line 57. "Royalty from owned or leased lands" shall include the royalties received from lands leased or subleased to other operators.

Line 58. "Interest and dividends" shall include the interest and dividends received from securities owned by the reporting operator.

Line 59. Itemize here any miscellaneous income not provided for elsewhere.

DEDUCTIONS FROM INCOME.

Line 63. "Taxes—income and excess profits" shall include one-twelfth of the estimated Federal income and excess-profits taxes to be paid on the current year's operations.

Line 64. "Interest" shall include interest on bond issues, mortgages, or other indebtedness of the reporting operator.

Line 65. Itemize here any deductions from income not provided for elsewhere.

ANALYSIS OF TONNAGE AND SALES.

All tonnage shall be reported on a net-ton basis of 2,000 pounds. Fractional parts of a ton are not to be shown, but should be adjusted to the nearest whole ton, so that the various items will add to the total shown. Power-house fuel shall not be included. Sales and transfers of produced coal only shall be shown in columns A, B, C, D, and E. Purchased coal must be shown separately in columns F

and G. The amounts to be reported in columns D, E, F, and G lines 72 to 75, shall be determined as outlined under the description of lines 45, 46, and 47, "coal sales and transfers." By "coal sales" is meant transactions in which bills have been rendered or payment made and the amounts have been entered on the general books as a credit to the sales account. Uncompleted transactions, such as unfilled orders or unbilled shipments, which have not been entered on the general books shall not be reported as sales.

COAL TONNAGE STATEMENT.

Line 83. Total sales shall show the tonnage of all commercial sales of produced coal and should check with the total shown on line 71, column D.

Lines 87 and 88. The values on these lines shall be based on the per ton cost of mining plus any transportation charges to storage points.

Line 91. Production tonnage. On this line should be shown the tippie weights of the entire production. Power-house fuel and slate and waste in preparation shall be subtracted to arrive at the net production shown on line 95.

BALANCE SHEET.

The accounts shown are self-explanatory, with the possible exception of the following:

Line 111. "Royalties paid in advance." Where a royalty lease carries a minimum clause with a recoverable period, any payments made in excess of the amount paid for coal actually mined shall be charged to this account.

Line 112. "Stripping done in advance." All expenditures for stripping the overburden from coal materially in advance of the actual recovery of the coal shall be charged to this account. As the coal is recovered the cost of removing this overburden shall be prorated on a tonnage basis and charged in the monthly report to "Amortization," (b) Stripping, line 23. The amount to be charged monthly to this account as cost should be determined by using a fixed rate per ton, which rate should be ascertained by dividing the estimated or actual total cost of removing the overburden by the estimated tonnage of coal recoverable. Appropriate credit should be made to this asset account, which should carry the total charge for stripping, less the credit for the prorated amounts charged to cost.

Lines 122 to 125, inclusive. State in the blank space on each line after the title whether the amount entered in the column are actual costs or appraised values.

Letters from Federal Trade Commission to companies re report for iron and steel industry.

61

Exhibit "F."

FEBRUARY 16, 1920.

Report for iron and steel industry.

GENTLEMEN :

A number of inquiries have been received in regard to the proper entries to be made in Schedule IV, "Contract Prices," and Schedule VI, "Orders." The following additional instructions are therefore given for making these returns.

SCHEDULE IV, CONTRACT PRICES.

The term "Contract" is intended to cover all agreements for the sale of specified commodities whether by formal written agreements or orders booked (exclusive of intercompany contracts with subsidiary companies and interdepartment transfers).

SCHEDULE VI, ORDERS.

Entries in column "Quantities booked during the month" should not include intercompany orders to or from subsidiary companies.

Very respectfully,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Exhibit "F1."

MARCH 5, 1920.

Report for iron and steel industry.

GENTLEMEN :

The enclosed forms are for use in submitting your report for the iron and steel industry for the month of February. The report, in accordance with the commission's letter of January 19, a copy of which is enclosed, should be submitted not later than March 25, 1920.

By direction of the commission.

J. P. YODER,
Secretary.

62

Exhibit "F2."

132GQ 36 GOVT

WASHINGTON, March 20, 1920—6.50 p. m.

Referring to commissions letter January nineteenth nineteen twenty iron and steel report Please mail report immediately or wire collect when it will be sent.

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

932

Exhibit "F3."

Report for iron and steel industry.

MARCH 20, 1920.

GENTLEMEN:

Under date of March 10th the commission wired your company as follows:

"Referring to commission's letter, January 19, 1920, iron and steel report, please mail report immediately or wire collect when it will be sent.

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

No reply has been received to this message and inasmuch as the commission wishes to close its January summaries promptly, it will be appreciated if the report is mailed at once if you have not already done so. Your cooperation in this matter will be appreciated.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.
Per DLW.

Exhibit "F4."

Report for iron and steel industry.

APRIL 6, 1920.

GENTLEMEN:

The inclosed forms are for use in submitting your report for the iron and steel industry for the month of March. The report, in accordance with the commission's letter of January 19, should be submitted not later than April 25, 1920.

By direction of the commission.

J. P. YODER, *Secretary.*

63

Exhibit "F5."

Report for iron and steel industry.

MAY 6, 1920.

GENTLEMEN:

The commission has received numerous inquiries recently as to whether, in view of the recent decision in the Maynard Coal Company case, it would continue to require monthly reports from iron and steel producing companies.

The commission believes that this information is useful and important to the general public, and also to the iron and steel industry. It seems that a large number of the companies realize this situation.

Therefore, the commission will continue to require these reports in the manner provided by the Federal Trade Commission act.

The order recently made by the District of Columbia Supreme Court in respect to the Maynard Coal Company put that company under bond to pay the penalties provided for by law in the event the final decision should be in favor of the commission, and meantime the commission is restrained only from proceeding against that company.

Your reports for the months of January, February, and March are past due and it is therefore requested that these reports be filed at once.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Exhibit "F6."

Report for iron and steel industry.

MAY 12, 1920.

GENTLEMEN:

The inclosed forms are for use in submitting your iron and steel industry report for the month of April, which should be filed not later than May 31, 1920.

Your attention is directed to Schedule VIII (income statement), which, in accordance with the commission's letter of January 19th, should be completed for the quarter ended March 31, 1920.

By direction of the commission.

J. P. YODER, *Secretary.*

64

Exhibits "G" to "G20."

Letters from Federal Trade Commission to companies re report for coal accounting (bituminous) and report for coke industry.

65

Exhibit "G."

JANUARY 16, 1920.

GENTLEMEN:

By this time you should have received copies of the commission's forms for reporting monthly cost, income, and tonnage of bituminous coal or lignite operators, also forms for annual balance sheet, and instructions for preparing them. In order that there may be no misunderstanding or delays in correspondence, and to check the accuracy of the mailing list, it is requested that operators fill out the attached form in full and return it to the commission at the earliest possible date.

The commission is desirous of receiving the cost reports and balance sheets regularly and promptly, and would greatly appreciate your cooperation in this matter. It is planned to publish monthly

cost data relative to the coal industry, and, for this reason, your reports should be filed as prescribed so that the data may be complete and up to date.

The forms sent you were for your cost, income, and tonnage report for the month of January, 1920, and for your balance sheet as of December 31, 1919, or the end of your last fiscal year. Blanks will be sent you in ample time for filing reports for subsequent months. Extra copies of blanks and instructions will be supplied upon request. The instructions are intended to fully cover all items in the cost, income, and tonnage report, and balance sheet, except a few which obviously need no comment. However, inquiries in regard to any item not entirely clear will receive a prompt reply.

Much time will be saved to operators and the commission if the employee who makes out the reports is instructed to see that each item is clearly and correctly entered, with an explanation of any unusual amount; additions and subtractions correctly made; name, address, and month correctly entered on each sheet; and, finally, that the certification is properly made, as no reports will be accepted unless properly signed.

Operators who have mines in more than one district or field, and who are therefore required to file a separate report for each district or field will receive notice within a few days as to the number of monthly reports required, and the operations to be included on each report. Until further notice such districts or fields will be those last designated by the engineers committee of the Fuel Administration.

Inclosed find an envelope requiring no postage for the return of the attached sheet.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

66

Exhibit "G1."

This sheet is to be promptly returned to the Federal Trade Commission

1. If there is any change in the name or address as shown above, please indicate same on the following lines:

2. If succeeded or purchased by an individual or company, please give new operator's name, address, and date of transfer on the following lines:

3. If your operations were suspended during 1919 for any reason give full information, whether mine was exhausted, flooded, abandoned, etc.:

4. The total tonnage, by months, for the calendar year 1919, produced by the operator whose name appears at the head of this sheet, was as follows:

(Net tons of 2,000 pounds. Do not report fractions of tons.)

Months.	Tons.	Months.	Tons.
		Total brought forward	
January		July	
February		August	
March		September	
April		October	
May		November	
June		December	
Total carried forward		TOTAL	

5. Any general remarks: -----

(Name and title of officer.)

67

Exhibit "G2."

JANUARY 20, 1920.

GENTLEMEN:

Upon representations from a large number of operators that their records are not kept in such manner as to permit the submission of a monthly cost report as early as the 20th day of the month following that for which the report is made, the requirement for the date on which reports should be mailed has been changed as follows: Reports should be mailed to the commission on or before the first day of the second month following the month covered by the report.

Very truly yours,

FEDERAL TRADE COMMISSION,
J. P. YODER, *Secretary*.

Exhibit "G3."

JANUARY 31, 1920.

Important notice.

GENTLEMEN:

The commission wishes to call your attention to a slight error which crept into the first run of the mimeograph copies of its new cost form C-51, which it was thought might lead to confusion. The error, which has since been corrected, is as follows:

Line 35 on page 2 of the cost form reads, "Total mining cost (add lines 9, 19, and 34)." The first figure "9" should be omitted. Operators are requested to examine the copies of the cost form recently sent them, and if line 9 is specified to see that it is crossed out.

As a result of statements from a number of operators relative to their practice in handling certain accounts and items, as well as inquiries made concerning the proper reporting of the same, the commission is forwarding herewith supplemental instructions for certain specified lines of its cost form C-51. These instructions supersede those for the same lines in the instruction books, and it is hoped they will clarify the original instructions and simplify the reporting of such items.

It is suggested that the attached page No. 8 be bound in with the other 7 pages comprising the books of instructions.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER, *Chief Economist.*

68

Exhibit "G4."

Supplemental instructions.

The instructions given below supersede or amend those for similar items shown in the original set of instructions.

Line 2. "Pick mining" shall include the total wages paid to pick men, helpers, shot firers, etc., whether paid by the car, ton, or day; also wages of other labor pertaining to the direct mining of coal by pick or hand, which under certain conditions are included in the mining wage rate. State in the blank space on this line the number of net tons pick mined during the month. Disregard the requirement of the rate per ton.

Line 3. "Machine mining" shall include the total wages paid to undercutters and loaders, whether paid by the car, ton, or day; also wages of other labor pertaining to the direct mining of coal by machine, which under certain conditions are included in the mining wage rate. State in the blank space on this line the number of tons mined by machine during the month. Disregard the requirement of the rate per ton.

If operators do not keep records enabling them to separate between wages paid for pick and machine mining they may combine lines 2 and 3 and show the total wages in one amount.

Line 4. "Other operating labor" shall include the wages paid for yardage and deadwork (except the cost of sinking shafts, driving

tunnels, slopes, and planes over 50 feet in length through rock or material other than coal which shall be charged to an asset account "development"), ventilation, drainage, timbering, haulage, removing stripped coal, washery, power house, and all other labor in and around the mine not provided for in the other accounts under the head of "Labor."

Line 91. Production tonnage. On this line shall be shown the tippable weights of the entire production if available from existing records. The total of the tonnage used at the power house (line 92) and the slate and waste in preparation (line 93) shall be shown on line 94, and this latter figure shall be subtracted from line 91 to arrive at the net production (line 95).

The compilation of the figures requested on lines 91-95 is entirely optional with the operator. Any difference between the tonnage figures on lines 90 and 95 will show losses incurred through shipping.

Exhibit "G5."

FEBRUARY 10, 1920.

GENTLEMEN :

On January 16th the commission mailed you a letter, and questionnaire to be filled in relative to your official name, present mail address, 1919 tonnage by months, etc., and further requested that the questionnaire be returned promptly to this office. According to the commission's records as of this date, the blank form mailed you has not been received.

The commission is very desirous of having its 1920 records of coal operators as complete and accurate as possible to prevent unnecessary delays in correspondence. In order that there will be no further loss of time in this matter, and assuming that the questionnaire previously mailed was not received, or, if received, has been mislaid, another copy is attached hereto for your use. Will you please have this blank form filled in by someone in your office and mailed to the Federal Trade Commission the same day on which you receive it?

In the event that you have already mailed the other questionnaire since this letter left Washington, it will not be necessary to also return the duplicate blank attached. Your prompt attention to this request will be greatly appreciated by the commission.

A franked envelope, requiring no postage, is enclosed.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Exhibit "G6."

MARCH 3, 1920.

Report for Coke Industry.

GENTLEMEN :

The enclosed forms are for use in submitting your report for the coke industry, for the month of February. The report, in accordance with

the commission's letter of January 23, a copy of which is enclosed, should be submitted not later than March 25, 1920.

By direction of the commission.

J. P. YODER, *Secretary*.

Exhibit "G7."

Important notice to operators.

GENTLEMEN:

Enclosed herewith will be found a supply of cost, income and tonnage blanks for filing February, 1920, report. If an additional supply of these blanks is necessary for making February returns, it will be furnished immediately upon request.

An examination of a large number of the January reports shows that, on the whole, they have been very carefully and accurately prepared. The results are unquestionably of great value in showing the present conditions in the industry. There is, however, an apparent misunderstanding on the part of a few operators in some mining districts as to just how certain items in the reports are to be shown. The items in question are itemized below.

1. Power-house fuel. Neither the tonnage used at the power house nor the value of such tonnage is to be shown under the heading of "Supplies," nor should such value be included on line 11 of the report with the cost of "Operating supplies." On the income side, the value of coal used at the power house should not be included on line 45, "Commercial sales," which figure should be identical with that on line 75, column D, page 4 of the report. On page 4, the tonnage or value of coal used at the power house should not be shown separately, nor should it be included with any other figure representing coal sales in any of the columns (A) to (G), inclusive.

The only space for showing both the tonnage and value of coal used at the power house is on line 92, page 5 of the report. Operators must not show these figures, nor include them, in any other place.

2. The certification sheet, which directly follows the cover of the report, must be signed by an officer of the company and returned with the report. All reports received without being properly signed will be returned for signature before the report is recorded as being received.

3. Operators are requested to see that all pages of the report (seven in all, including the cover page and certification page) are clipped together before mailing same to this office. If an operator does not produce any coal during any month, or does not operate his plant for any reason, he should indicate the necessary facts across the face of the report, sign same, and return all the blanks to this office.

Yours very truly,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Encl.

Exhibit "G8."

MARCH 10, 1920.

"Coal-accounting (bituminous)."

GENTLEMEN :

According to the commission's records no reply has been received from you in answer to its circular letters of January 16th and February 10th, enclosing a questionnaire to be filled in and promptly returned to this office. As neither of the letters were returned by the postal authorities, it is reasonably assumed that they were delivered.

The commission is very desirous of having its 1920 records of coal operators as complete and accurate as possible to prevent unnecessary delays in correspondence. In order that there will be no further loss of time in this matter, and assuming that the questionnaire previously mailed has been mislaid, another copy is attached hereto for your use. If you cannot furnish the 1919 tonnage by months, the total production for the year will be satisfactory, provided the period such tonnage covers is shown. Will you please have this blank form filled in by someone in your office and forwarded to the Federal Trade Commission by return mail.

If your company is no longer in the coal mining business, or if your mine has been temporarily closed down, please make such notation under No. 3 of the questionnaire and return it to this office so that your name may be removed from the mailing list.

In the event that you have already mailed the other questionnaire since this letter left Washington, it will not be necessary to also return the duplicate blank attached.

Your prompt attention to this request will be greatly appreciated by the commission.

A franked envelope, requiring no postage, is enclosed.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Encl.

Exhibit "G9."

1920 MAR 11—P. M. 5.53.

B137 W 41 GOVT

NR WASHINGTON DC 415P 11

WESTMORELAND CONNELLSVILLE COAL AND COKE CO.

FRICK BLDG PITTSBURGH PA

REFERRING TO THE COMMISSIONS LETTER JANUARY TWENTY-THIRD NINETEEN TWENTY COKE REPORT PLEASE MAIL REPORT IMMEDIATELY OR WIRE COLLECT WHEN IT WILL BE SENT

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

MARCH 11, 1920.

"Coal-accounting (bituminous)."

GENTLEMEN:

On February 8 and 9, 1920, at a conference held between officials and representatives of the National Coal Association and authorized representatives of the Federal Trade Commission, consideration was given to various suggested changes in the new monthly coal cost form on which reports are required by the commission. As a result of this conference, certain modifications have been made in the instructions previously sent you, copy of which is enclosed. Please note that in some instances they supersede as well as amplify the former instructions and should be attached to original instructions for future reference.

The report blanks for February, 1920, will be mailed you in a few days. In filling them out please follow the revised instructions.

Very truly yours,

FEDERAL TRADE COMMISSION,
J. P. YODER, *Secretary*.

Encl.

Exhibit "G11."

Supplemental instructions, accompanying letter of March 11, 1920.

The instructions given below supersede or amend those for similar items shown in the original set of instructions.

Line 5 and 13—Maintenance and repairs. Operators whose pay rolls, cost sheets or other records segregate these accounts from the general operating costs are required to show such expenditures for labor and supplies on lines 5 and 13, respectively. Operators who find it impossible or impracticable to segregate items under this account from their other costs of operation may include such charges for labor and supplies on lines 4 and 11, respectively.

The commission may from time to time also require operators to furnish an analysis of charges under this account or others, or have one of its agents examine an operator's books to ascertain charges applicable under any or all headings.

Power-house fuel. The commission does not allow the inclusion of a separate charge for power-house fuel in operating costs. Such a separate charge would be a duplication, since the cost of production of such coal is already included under the several headings of labor, supplies and certain fixed charges. The commission, however, does not wish to minimize the importance to operators of the necessity of keeping records showing the cost of the coal used at the power plant, as such figures would be of value in determining the economic advantages or disadvantages of producing power as compared with purchasing power for the operation of their plant. It is suggested and recommended that the value of the power-house fuel, based on

the cost of production, be shown each month in the blank space on line 92 after the title.

Line 18. "Supplies sold and miscellaneous revenue." Several questions arose during the conference as to just what should or should not be considered as proper credits to cost under the several subdivisions set out in the instructions, and a number of complex cases were cited. The following amplification of the text may clarify the intended meaning:

(a) Sales of explosives, etc.: When the cost of such supplies is charged into operating costs either direct or through an inventory adjustment the loss or gain from their sale should be shown as a debit or credit to cost. Supplies purchased through the Company store or commissary should not be included here, but should be treated as a profit or loss under Miscellaneous Income or Deductions from Income.

(b) Smithing: When carried as a separate account, the net revenue should be entered as a credit to cost. When a company credits this earning direct to an operating account the same result is obtained and is satisfactory to the Commission.

(d) Rents: Rents which are to be included herein are those amounts received from the miners for the use of tenements or dwellings built at or near the mining property for the accommodation of employees of the Company. No rents should be included from buildings, dwellings, or real estate that are not an integral part of the mining operation; such rents should be included as a part of "Miscellaneous Income."

Lines 47 and 52. "Purchased Coal Sales" and "Purchased Coal Cost" are included on the cost form as a part of "Total Sales and Transfers" and "Total Cost of Coal Sold." As used in the office tabulations, the costs and receipts of Purchased Coal are not combined with Produced Coal Costs and Receipts, but are treated as a Miscellaneous Income and Deduction.

Line 51. "Coal Inventory." To the value of the inventory at the close of the month should be added the value of coal in transit not invoiced, based on the cost of production.

In view of the fact that coal operators have been experiencing considerable difficulty as a result of coal being confiscated and diverted, it was deemed advisable to suggest a method of handling and reporting such tonnage on the Commission's cost forms. Such coal should be carried in inventory until invoiced. If the confiscated or diverted coal was shipped during 1919 but invoiced during the current year, the tonnage and value of such coal should be treated as inventory as at December 31, 1919.

Exhibit "G12."

MARCH 20, 1920.

Report for coke industry.

GENTLEMEN:

Under date of March 11th the commission wired your company as follows:

"Referring to commission's letter, January 23, 1920, Coke Report, please mail Report immediately or wire collect when it will be sent.

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

No reply has been received to this message and inasmuch as the commission wishes to close its January summaries promptly, it will be appreciated if the report is mailed at once if you have not already done so. Your cooperation in this matter will be appreciated.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Per DLW.

Exhibit "G13."

MARCH 27, 1920.

"Coal-accounting (bituminous)."

GENTLEMEN:

According to the Commission's records no reply has been received from you in answer to its circular letters of January 16th and February 10th, enclosing a questionnaire to be filled in and promptly returned to this office. As neither of the letters were returned by the postal authorities, it is reasonably assumed that they were delivered.

The Commission is very desirous of having its 1920 records of coal operators as complete and accurate as possible to prevent unnecessary delays in correspondence. In order that there will be no further loss of time in this matter, and assuming that the questionnaire previously mailed has been mislaid, another copy is attached hereto for your use. If you cannot furnish the 1919 tonnage by months, the total production for the year will be satisfactory, provided the period such tonnage covers is shown. Will you please have this blank form filled in by someone in your office and forwarded to the Federal Trade Commission by return mail.

If your company is no longer in the coal mining business, or if your mine has been temporarily closed down, please make such notation under No. 3 of the questionnaire and return it to this office so that your name may be removed from the mailing list.

In the event that you have already mailed the other questionnaire since this letter left Washington, it will not be necessary to also return the duplicate blank attached.

Your prompt attention to this request will be greatly appreciated by the Commission.

A franked envelope, requiring no postage, is enclosed.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

Encl.

Exhibit "G14."

APRIL 6, 1920.

Report for coke industry.

GENTLEMEN:

The enclosed forms are for use in submitting your report for the coke industry, for the month of March. The report, in accordance with the Commission's letter of January 23, should be submitted not later than April 25, 1920.

By direction of the Commission.

J. P. YODER, *Secretary.*

74

Exhibit "G15."

APRIL 21, 1920.

"Coal-Accounting (Bituminous)."

GENTLEMEN:

Will you not favor the commission with at least an acknowledgment of its several letters by returning, filled out as completely as possible, one of the copies of the questionnaire enclosed therein? Without a reply of any kind in its records the commission is unable to understand your position in the matter, or know the reason for not returning the questionnaire.

The commission feels sure that upon reflection you will readily appreciate the uncertainty naturally existing where an operator fails to respond. This office, as a result of such action, does not know whether the operator is still in business, has sold or leased his property to another, or has abandoned or suspended operations, etc. By answering these simple facts and mailing the questionnaire you will relieve the commission of any misunderstanding in the matter and enable it to perfect its records. If your company feels that it can not furnish the detailed tonnage statement requested under Item 4 on the form, the total for the year will suffice.

The commission wishes to express its thanks for your previous co-operation and requests that you please have some one on your office staff make the necessary notations on the questionnaire and return it to this office at the earliest possible date. You are assured that your prompt reply will be greatly appreciated.

A franked envelope, requiring no postage, is enclosed herewith.

Very truly, yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,

Chief Economist,

Per DLW.

Enc.

Exhibit "G16."

APRIL 26, 1920.

GENTLEMEN:

The commission has received numerous inquiries recently as to whether, in view of the recent decision in the Maynard Coal Company case, it would continue to require monthly reports from coal-mining companies.

The commission believes that this information is useful and important to the general public, and also to the coal operators. It seems that a large number of the operators realize this situation. Therefore, the commission will continue to require these reports, except from the Maynard Coal Company, in the manner provided by the Federal Trade Commission act, until the appeal in the Maynard Coal Company case is decided by the United States Supreme Court.

The order recently made by the District of Columbia Supreme Court in respect to the Maynard Coal Company put that company under bond to pay the penalties provided for by law in the event the final decision should be in favor of the commission, and meantime the commission is restrained from proceeding against that company.

Very truly, yours,

FEDERAL TRADE COMMISSION,
J. P. YODER,
Secretary.

75

Exhibit "G17."

APRIL 26, 1920.

"Coal-Accounting (Bituminous)."

GENTLEMEN:

Will you not favor the commission with at least an acknowledgment of its several letters by returning, filled out as completely as possible, one of the copies of the questionnaire enclosed therein? Without a reply of any kind in its records the commission is unable to understand your position in the matter, or know the reason for not returning the questionnaire.

The commission feels sure that upon reflection you will readily appreciate the uncertainty naturally existing where an operator fails to respond. This office, as a result of such action, does not know whether the operator is still in business, has sold or leased his property to another, or has abandoned or suspended operations, etc. By answering these simple facts and mailing the questionnaire you will relieve the commission of any misunderstanding in the matter and enable it to perfect its records. If your company feels that it can not furnish the detailed tonnage statement requested under Item 4 on the form, the total for the year will suffice.

The commission wishes to express its thanks for your previous cooperation and requests that you please have some one on your office staff make the necessary notations on the questionnaire and return it to this office at the earliest possible date. You are assured that your prompt reply will be greatly appreciated.

A franked envelope, requiring no postage, is enclosed for your use.

Very truly, yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist,
Per DLW.

Enc.

Exhibit "G18."

MAY 6, 1920.

Report for Coke Industry.

GENTLEMEN:

The commission has received numerous inquiries recently as to whether, in view of the recent decision in the Maynard Coal Company case, it would continue to require monthly reports from coke companies.

The commission believes that this information is useful and important to the general public, and also to the coke operators. It seems that a large number of the companies realize this situation. Therefore, the commission will continue to require these reports in the manner provided by the Federal Trade Commission act.

The order recently made by the District of Columbia Supreme Court in respect to the Maynard Coal Company put that company under bond to pay the penalties provided for by law in the event the final decision should be in favor of the commission, and meantime the commission is restrained only from proceeding against that company.

Your reports for the months of January, February, and March are past due and it is therefore requested that these reports be filed at once.

Very truly, yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER.*Chief Economist,*

Per DLW.

Enc.

76

Exhibit "G19."

MAY 12, 1920.

Report for coke industry.

GENTLEMEN:

The enclosed forms are for use in submitting your coke industry report for the month of April, which should be submitted not later than May 31, 1920.

Your attention is directed to Schedule VIII (income statement), which, in accordance with the commission's letter of January 23d, should be completed for the quarter ended March 31, 1920.

By direction of the commission.

J. P. YODER,
*Secretary.**Exhibit "G20."*

MAY 22, 1920.

Important notice to operators.

GENTLEMEN:

Enclosed herewith will be found a supply of cost, income, and tonnage blanks for filing April, 1920, reports. If an additional supply of these blanks is necessary for making returns, it will be furnished immediately upon request.

The attention of operators is called to statement on page 1 of Bulletin No. 2, recently mailed you, relative to the study now being made by the commission of the capital investment necessary to operate mining properties in various districts. In this connection the commission requests the operators who have not as yet filed their balance sheet statements for the year ending December 31, 1919, or the latest fiscal year to do so at the earliest possible date. The commission has not urged the return of these statements prior to this time as it realized that a great many operators had not closed their books for 1919, but it is assumed that all such records are now closed and the statements can be furnished without difficulty. If the balance sheet forms already supplied have been mislaid, additional copies will be mailed upon request.

The commission fully appreciates the cooperation of the majority of operators in filing their monthly returns promptly, but requests that all operators endeavor to file such reports upon the date due in order that the figures for the bulletin may be the more promptly compiled. It is hoped that this bulletin can be published from ten days to two weeks earlier than it is at present, and this can only be accomplished by the full cooperation of the operators.

Very truly yours,

FEDERAL TRADE COMMISSION,
FRANCIS WALKER,
Chief Economist.

77

Restraining order.

Filed June 12, 1920.

And now, June 12th, 1920, on motion of complainants, upon filing of the bill of complaint and of affidavits in support thereof, and it appearing to the court that immediate and irreparable injury, loss, and damage will result to the applicants before notice can be served and a hearing had on the application for a preliminary injunction in this, to wit: that if defendants continue the applications for writs of mandamus against said complainants as already begun a multiplicity of suits will follow, and said complainants be put to great cost and expense in defending each one thereof when the whole question and all the questions at issue could be decided as to all of said complainants in the one suit as proposed, and to give notice would enable the defendants, if they were so minded, to bring many of said proceedings before the hearing could be had on the application for relief of said bill of complaint. Now, therefore, it is ordered that a temporary restraining order be issued, returnable June 21st at 10 a. m., at Equity Division No. 2 of the Supreme Court of the District of Columbia, restraining and enjoining the said Federal Trade Commission, its members, agents, assistants, deputies, employees, and attorneys, from taking any steps or instituting any suits or causing the same to be instituted or any proceedings of any kind to compel compliance with said orders or to require answers to said questionnaires of said Federal Trade Commission set forth or referred to in said bill of complaint in the above-stated suit, provided, however, the complainants, or some of them, execute the usual undertaking

78 with sureties to pay such costs and damages, not to exceed five thousand dollars, as may be incurred or suffered by any party who may be found to have been illegally enjoined or restrained by this temporary restraining order.

JENNINGS BAILEY,
Justice.

Signed and issued June 12th, 1920, at 11.50 a. m.

79 Filed Dec. 2, 1921.

Come now the defendants, and file this.

Amended answer.

* * * * *
The joint and several answer of the Federal Trade Commission, Nelson B. Gaskill, Huston Thompson, and Victor Murdock, members of the Federal Trade Commission, defendants, to the bill of complaint in the Claire Furnace Company et al., plaintiffs above named:

These defendants now, and at all times hereinafter, saving to themselves, and each of them, all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill of complaint contained, for answer thereunto, or to so much and such parts thereof as defendants are advised it is or are material or necessary for them to make answer unto, answering say:

1. As to the first paragraph of the bill, these defendants admit that the names and corporate character of the several plaintiffs are as stated therein.

2. As to the second paragraph of the bill, these defendants admit that each and every party named as complainant therein, and others similarly situated, except Republic Iron and Steel Company and Bethlehem Steel Company, is or would be equally interested in the subject matter of this suit and in seeking to obtain the relief prayed for; but these defendants deny that Republic Iron & Steel Company and Bethlehem Steel Company are proper parties complainant or are entitled to the relief sought, for the reason that at and before the filing of this bill said last-mentioned complainants were parties respondent in actions instituted in the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, respectively, in which all questions pertinent to the issue raised by this bill by and on behalf of these two complainants can be fully and adequately heard and determined.

3. As to the third paragraph of the bill, these defendants admit the allegations thereof, except that William B. Colver and John Garland Pollard are no longer members of the commission, but that the other persons named as defendants and John F. Nugent now constitute the Federal Trade Commission.

4. As to the fourth paragraph of the bill, these defendants admit that the Federal Trade Commission, on or about December 15, 1919, adopted a resolution, a copy of which is attached to the bill as Exhibit A; but defendants aver that the said resolution does not set forth their only source of authority for requiring the reports sought

to be enjoined, but that the authority under which these defendants have proceeded is hereinafter more fully set forth.

5. As to the fifth paragraph of the bill, these defendants admit that service upon complainants and others, on January 19th, 1920, 80 of the order to report the cost of steel production and the form for such report, referred to in the bill as Exhibits B and C; and that subsequently, on January 23rd, 1920, they likewise served the order and report form covering the coke industry, referred to in the bill as Exhibits B1 and E, under the authority of the statute referred to in their resolution, Exhibit A. All of these exhibits are true copies of the originals so served. And these defendants aver that said forms for reporting were prepared with only such detail as this commission and competent accountants consider necessary to produce the information which the commission is authorized by the statute to obtain, viz, as to the organization, business, conduct, practices, and management of those engaged in the steel industry.

6. As to the sixth paragraph of the bill, these defendants admit that they served further orders and demands on complainants, copies of which are attached to the complaint and marked, respectively, Exhibits F to F6 and G to G20.

7. As to the seventh paragraph of the bill, these defendants aver that the orders and notices referred to in paragraph 7 speak for themselves, and any allegations as to the implications to be drawn therefrom are allegations of law, not necessary to be answered.

8. As to the eighth paragraph of the bill, these defendants deny that the preliminary injunction issued in the case of Maynard Coal Company v. Federal Trade Commission by this honorable court, restrained defendants from performing its duties under the law, as to these complainants, and of pursuing, as to them and others not parties to said action, the activities, herein sought to be permanently enjoined. Defendants aver that the activities of defendants as to steel and coke are separate and different from their activities as to coal, and that the requirements as to steel and coke differ essentially from the requirements as to coal, and in support of this allegation defendants refer to the report forms and schedules attached to the Bill of Complaint relating to each of said commodities.

9. As to the ninth paragraph of the bill, these defendants deny the allegations thereof, that they claim authority to perform the acts complained of exclusively under paragraphs (a) and (b) of section 6 of the Federal Trade Commission act, and aver that they claim authority to perform said acts under paragraphs (a), (b), (f), and (g) of section 6 and under section 9 of said act, and under all the authority conferred upon the commission by Congress.

Defendants deny the allegations of said paragraph, that the Federal Trade Commission ordered answers to said questionnaires solely and only for the purpose of gathering and compiling said information and publication; they aver that the Federal Trade Commission required answers to said questionnaires for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication and the consequent regulation of the interstate commerce of said complainants resulting from such publication of the true trade facts as to all of the business of complainants and of others engaged in commerce

in those commodities, and including the purpose of making reports to Congress and of recommending additional legislation to Congress.

Defendants allege that all of the information to be acquired through the answers to said questionnaires is necessary and has direct relation to regulation and control of the interstate and foreign commerce of complainants and others answering said questionnaires, and is sought by the Federal Trade Commission for the purpose and in necessary aid of the regulation of said commerce.

Defendants admit that no complaint has been filed or is now pending before the commission against any of complainants for a violation of section 5 of the trade commission act, but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provisions of said trade commission act.

81 Except as herein admitted, the allegations of paragraph 9 are denied.

10. As to paragraph ten of the bill, these defendants admit that each of complainants is engaged in commerce and makes some sales in the state where its products are manufactured. Defendants aver on information and belief that the greater part, in both quantity and value, of purchases and sales made by each of complainants, is in interstate or foreign commerce. With the exception of the Claire Furnace Company, the Ella Furnace Company, and the Reliance Coke Company, defendants on information and belief aver that sixty-five per cent or more of the sales made by each of complainants is in interstate or foreign commerce, and that the greater portion of the principal raw materials of each concern is purchased and transported in interstate commerce to their converting plants. The exact percentage, quantity, and value of purchases and of sales made in interstate and foreign commerce by each of complainants is unknown to defendants, and defendants have no way of ascertaining the same, and, therefore, cannot and do not admit the allegations of paragraph ten with respect thereto, but if the same are material they call for strict proof thereof.

Defendants aver that each of complainants, with two or three exceptions, is engaged in interstate commerce in the purchase or production of raw materials and the assembly thereof at the place of processing them, and in contracting for the sale of the product and the transportation thereof in interstate commerce. And these defendants further aver that the interstate and intrastate commerce of each and every of the complainants is conducted as a single non-separable whole.

11. As to paragraph eleven of the bill, these defendants deny the allegations thereof and in refutation of the arguments therein advanced aver

(a) that the Congress of the United States has by necessary inference, the power to secure information concerning any subject matter as to which it has been given the power of legislation; that when one phase of a subject matter is within the jurisdiction of the Congress there arises by necessary inference the power of Congress to secure information as to the whole of the subject matter in order that any subsequent regulation of matters within the Federal jurisdiction may be properly adjusted to the public welfare; that the

Congress empowered these defendants as its agency, to collect information from the several corporations whose operations, considered collectively, constitute an industry, in order that Congress and the public may be informed as to the state of the industry as a whole, and that the Congress may consider what legislation, if any, is appropriate to that part of the industry which comes within its jurisdiction; that the power of Congress to obtain information is not limited to interstate commerce but may include intrastate commerce as well, when the two phases are a part of one subject; that the orders and report forms issued to complainants and others are intended to secure certain information as to the whole of the steel industry of the United States and coke and pig iron in connection therewith, which industry includes both interstate and intrastate commerce; and that in order to acquire accurate and complete information as to that portion of complainant's business which is interstate, and in order to enable the commission to perform its duties as to the interstate and foreign commerce of complainants and all others in such industry, including its regulatory duties as to such interstate commerce that are necessarily incident to and follow and flow from the dissemination of the complete trade facts as to these basic industries, it is necessary that defendants procure complete information of all the business of each of complainants, both that which is interstate and that which is intrastate, including production and costs, and, therefore, said orders and report forms are lawfully issued.

(b) That said orders and questionnaires do not in fact or in effect prescribe the form and manner in which complainants shall keep their books of account, and are not intended so to do. These defendants are advised by competent accountants that any industry having a reasonably accurate and comprehensive accounting system can, without change of its form or manner of book-keeping, supply the information called for by the said questionnaires. That as to the steel schedules and reports, they substantially and in fact require complainants to furnish information and make reports only in so far as their records and method of keeping same enable them so to do, and defendants specifically deny that said requirements prescribe a different system of keeping records than is now employed by complainants, and aver that such requirements do not in fact prescribe any form of keeping records and books.

(c) That the said questionnaires do not require the complainants to furnish information beyond the scope of the authority conferred by the commission act.

(d) That the requirement of a regular monthly report is within the intent and meaning of the authority to require annual or special reports, and that the provision for a monthly report in lieu of irregular special reports, is merely an adaptation of the power to require special reports, at such intervals as will supply the necessary information in a timely and convenient manner.

(e) That the provision of said orders and questionnaires for the inspection of the books and accounts of complainants is for the purpose of checking the reports submitted when necessary, in order that the commission may be assured that such reports are accurately and properly made, and in order that the provisions of the second section of paragraph 10 of the commission act, establishing penalties for

the submission of false statements, may be duly and properly enforced if and when necessary.

(f) That said orders and said questionnaires are justified and authorized by the provisions of the commission act, hereinbefore referred to.

(g) The purpose for which the Federal Trade Commission has issued said orders and questionnaires is that authorized by law, and said orders and questionnaires are calculated to effectuate the purpose declared by statute and any expression or additional statement made by the commission in Exhibit "A," in addition to the reference made therein and thereby to section 6, paragraphs (a) and (b) of the commission act can not detract from nor destroy the presumption that these defendants have issued said questionnaires in accordance with law and for the uses and purposes expressed therein.

(h) Said orders and said questionnaires and the action of these defendants in demanding answers thereto and compliance therewith, are not an unauthorized and unwarranted usurpation of power and an intrusion upon private affairs, private business, and the private rights of complainants, but are done and performed by virtue of a statute passed by the Congress of the United States and approved by the President thereof, the constitutionality whereof and the legality of the acts performed in pursuance thereof will be presumed until the contrary is established by a court of competent jurisdiction. That these defendants in publishing the information propose to comply with the provisions of the said statute and not disclose any trade secrets or the names of customers and not disclose the costs of any individual manufacturer and to make such publication only in such form and manner as will conceal, rather than disclose, the secrets of the business of any individual operator; and these defendants expressly deny that it will make publication of such information in such form or manner as to take away any property rights of complainants in their processes, organizations, and methods, and aver that the contrary is not to be presumed against them. Defendants aver the fact to be that, as to the steel industry, these complainants cause to be published in a trade publication of that industry, the Iron and Steel Institute, many of the facts called for, and that as to coal, the National Coal Association, a trade association of that industry, did gather and disseminate much more complete information than that called for by defendants, but defendants aver that such dissemination was made largely directly to competitors or supposed competitors in the same industry, and that only such portions were given to the public as might be deemed advisable to those self-interested in the industry.

83 (i) The announced purpose of these defendants to collect and make public the information sought to be obtained by said orders and questionnaires is in conformance with paragraph (f) of section 6 of said act.

(j) These defendants deny that the said orders and questionnaires will entail upon the complainants an enormous expense, as alleged in the bill of complaint, in order to make correct answers to said questionnaires, but aver that any corporation with a reasonably accurate and comprehensive accounting system can, without expense disproportionate to the industry, prepare the answers to said questionnaires, and that the forms of these questionnaires will not result

in an expense to the complainants disproportionate to the industry, and that if a reasonable expense should be thereby entailed, or some corporations not now keeping comprehensive and accurate accounting system should be led to install said system and thereby to entail expense, such result does not in itself or in contribution with other causes render either the act of Congress unconstitutional, nor the acts of these defendants under said act of Congress unlawful. That the forms prescribed by said questionnaires are carefully prepared by competent accountants in accordance with approved methods of accounting, and call only for such details as will enable the accountants of these defendants, by interior checking, to determine the accuracy of the results stated, and that the various subdivisions of said questionnaires are neither vague nor indefinite, but are perfectly capable of being understood by competent accountants.

12. As to the twelfth paragraph of the bill, these defendants deny that the interpretation placed upon the trade commission act by them in issuing said orders and questionnaires and demanding compliance therewith and answers thereto make the trade commission act unconstitutional and illegal and void, and aver—

(a and b) That the act of Congress and the issuance of the said orders and said questionnaires is not a regulation of property and business, but is the collection of information, the dissemination of which will result in a lawful and proper regulation of the interstate and foreign commerce of complainants and of others in said industries and businesses, and the report thereof to Congress may or may not result in further legislative regulation by Congress itself; that the power of the said Congress to obtain such information with relation to the whole of an industry is not confined to that part of such industry as may be determined to be in interstate commerce, but includes all phases thereof, irrespective of whether subsequent legislation could or could not cover the entire field of the inquiry. That it being by fair implication conceded by these complainants in paragraph 10 of said bill of complaint that at least a part of the business of each complainant includes the sale of its products in interstate commerce, it follows, therefore, that the Congress has power to obtain information with relation to the interstate business of these complainants, and it is likewise well established by judicial decisions that if the regulation by congressional authority of interstate commerce results in a discrimination between interstate and intrastate commerce that the power of the United States may be exerted upon intrastate commerce for the purpose of removing such discrimination; therefore, the power of the Congress to regulate intrastate matters for the protection of interstate commerce being established, it likewise follows that the Congress may, in order to obtain information relating to interstate business, likewise obtain information relating to the intrastate phase of any branch of that commerce, and the acts of these defendants in seeking such information as will cover the whole of the industry, whether interstate or intrastate, do not make the said act of Congress unconstitutional and void.

(c) The right of privacy claimed by complainants as to their books of account, papers, contracts, and transactions is subject to the right of the Congress of the United States in promotion of the general welfare, to secure information to be afforded by an examina-

tion of such books of account, papers, contracts, and transactions when necessary, for the reason that the said complainants are engaged in a business, which by reason of the nature thereof and its relation to the need of organized society is charged with a public interest, and is subject because of that interest as well as because of its appearance in part, at least, in interstate commerce to the right of the power of the Congress to obtain information with relation to the whole of the industry in which these complainants and others are engaged, that to the extent to which these defendants by authority of Congress now seek to exercise this right, there is no violation of the fourth amendment of the Constitution of the United States, protecting against unreasonable search and seizure. That each of complainants is a corporation organized and existing under the laws of a certain state, and that each of complainants, with a possible exception, has elected to engage in, and does continuously engage in, interstate commerce, and thereby has placed itself under the complete power of Congress and its agencies, including the Federal Trade Commission, as to such interstate commerce. That any corporation that engages in interstate commerce has no privilege of refusing to give information called for which, as hereinbefore averred, is necessary in the exercise of such complete regulatory power over interstate commerce. That under such circumstances the search and seizure clause of the fourth amendment to the Constitution has no application to corporations as to requirements made by defendants under a specific statute; and that, at all events, the fourth amendment only applies to criminal matters, and the activities sought to be enjoined are in no sense criminal proceedings.

(d) These defendants deny that compliance by complainants with said orders and answers to said questionnaires will subject them to unnecessary expense and loss in the preparation of said reports and in making provision therefor in their system of accounts, and will thereby deprive complainants of their property without due process of law and without just compensation, for the reasons, first, that compliance by the complainants with said orders and making answers to said questionnaires will not entail loss or expense out of proportion to the business, and, second, that if such loss or expense is incurred, it is within the power of the Congress of the United States to require of complainants the making of such expenditure, as is instanced by the authority granted by the Congress to the Interstate Commerce Commission to require railroads engaged in interstate commerce to keep their books of account in forms prescribed by that commission, and where necessary in order to obtain accurate results as to interstate commerce, to prescribe said forms and require reports in accordance therewith as to the intrastate operations of said companies, thereby entailing expense upon them.

13. As to paragraph thirteen of the bill, these defendants deny the allegations and conclusions stated therein and refer to paragraphs 11 and 12 of this answer.

14. As to paragraph fourteen, these defendants aver that they have the lawful authority to proceed and intend to resume the activities, herein sought to be enjoined, as soon as and whenever they are released and relieved from the restraining orders of this court.

Further answering, defendants state:

15. That by an act approved February 14, 1903 (32 Stat. 827), Congress created in the Department of Commerce and Labor the Bureau of Corporations, and granted to the commissioner of said bureau power and authority to make—

Diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to "An Act to regulate commerce," approved February Fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

85 And in order to accomplish the above purposes declared said Act provided that—

The said commissioner shall have and exercise the same power and authority in respect to corporations, joint-stock companies, and combinations subject to the provisions hereof as is conferred on the Interstate Commerce Commission in said "Act to regulate commerce" and the amendments thereto in respect to common carriers so far as the same may be applicable, including the right to subpoena and compel the attendance and testimony of witnesses and the production of documentary evidence and to administer oaths. All the requirements, obligations, liabilities, and immunities imposed or conferred by said "Act to regulate commerce" and by "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred ninety-three, supplemental to said "Act to regulate commerce," shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence in pursuance of the authority conferred by this section.

And said Act also provided that—

It shall also be the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor, to gather, compile, publish, and supply useful information concerning corporations doing business within the limits of the United States as shall engage in interstate commerce or in commerce between the United States and any foreign country, including corporations engaged in insurance, and to attend to such other duties as may be hereafter provided by law.

In pursuance to the powers and duties of said act, the Commissioner of Corporations during the period of the existence of said Bureau, from February 14, 1903, to September 26, 1914, carried on numerous and various investigations, in the course of which he gathered, compiled, and published complete information as to the activities of the concerns investigated, including not only their interstate but their intrastate business.

That in 1914 there was passed by the House of Representatives a bill creating an interstate trade commission, and granting to it similar powers of investigation then possessed by the Bureau of Corporations. That neither the Bureau of Corporations act nor the above referred to bill as passed by the House provided for any formal proceedings.

That as passed by the Senate, said bill, agreed to in conference and finally enacted into law as the Federal Trade Commission act, incorporated section 6 of the Federal Trade Commission act, greatly broadening and extending the powers then held by the Bureau of Corporations.

That by the Federal Trade Commission act it was also provided (section 3) that the Bureau of Corporations shall cease and "all pending investigations and proceedings of the Bureau of Corporations shall be continued by the Commission."

That from its inception to date Congress has appropriated moneys in lump sum to be used by the Federal Trade Commission in carrying out its powers and duties under said act, including those granted by said section 6. That during its existence and to date the commission has continued its activities similar to those carried on by the Bureau of Corporations above mentioned, suitably changed to meet the changing conditions in industry, and as directed, authorized, and empowered by Congress thereunder, in which investigations it has continuously used the money appropriated in lump sum by Congress for its use.

That at all times covered by this case the commission has had available moneys from said lump-sum appropriations and has expended them in its work of gathering, compiling, and disseminating

86 information as it was authorized and required to do by section 6 of said act. That until enjoined by this court in this proceeding and in the proceeding in this court in the case of the Maynard Coal Company v. Federal Trade Commission, it was continuing to perform its said duties under said act, employing therein the funds of the said lump-sum appropriations. That for some time after the granting of said injunctions it continued to perform such duties in so far as it could perform them without violating such injunctions, namely, by calling for voluntary reports from those engaged in the steel, coke, and coal industries; and it continued such activities until it appeared to the commission that by reason of said injunctions and suits pending the voluntary responses so fell off as to render the information compiled so fragmentary, partial, and incomplete as to make it of no accurate or substantial value either to the public, the industry, or Congress, and that said activities were also paid for out of the commission's lump-sum appropriations above mentioned.

That the commission, in the performance of its duties, as authorized and directed by Congress, as the commission believes its duties require, proposes to resume such activities as soon as and whenever it is released and relieved from the said restraining orders of this court; and that it has available, under its lump-sum appropriations, moneys to use, and which it proposes to use, in the pursuance of said activities and the performance of said duties.

16. That the commission under its act has full and complete power to gather, compile, and disseminate the information called for, and

which is sought to be enjoined in this case. That in the performance of its duties it is necessary for the commission to have the information called for, both as to interstate and intrastate transactions of complainants and of others in such industries, in order that the facts may be complete and accurate and not incomplete, partial, and inaccurate, and without value to the commission in the performance of regulatory powers, granted by Congress under its act, to the public, to the industries themselves, and to Congress.

That the power of Congress to grant such powers to the Federal Trade Commission as an administrative body has been fully upheld by the Supreme Court of the United States as to a power which more clearly involves purely intrastate activities of concerns which are engaged in interstate commerce than is granted by the Federal Trade Commission act and exercised by the commission and its predecessor, the Bureau of Corporations, under their acts, and which are now enjoined by this court.

17. That the requirements of the commission sought to be permanently enjoined in this case are not unreasonable or an abuse of discretion or unduly expensive (considering the size of the industries concerned), and that they are not in violation of any rights possessed by the complainant corporations, either in violation of the fourth, fifth, or tenth amendments to the Constitution; that as to such corporations engaged in interstate commerce, they are neither deprivation of property without due process, nor are they undue search or seizure, nor search and seizure of any kind. That they are not sought in a criminal proceeding or in aid of procuring evidence against such concerns in any criminal proceeding, and that they are not done in the absence of authority, but that they are done under specific provision of statute and power thereby granted. That said activities are all directed toward the gathering and compiling of information from corporations incorporated under State laws, whose only privileges of engagement in interstate commerce beyond the boundaries of the State in which incorporated are and must be subject to the general, full, and complete powers of Congress of regulation of interstate commerce and its other powers under the Constitution, either expressed or implied, including its powers to promote the general welfare and to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States or in any department or officer thereof.

87 18. That unless it can procure the information called for and required, the commission will be unable to properly perform its duties under its act, for the reason that all of said complainants while engaged substantially in interstate commerce, had also certain activities which are performed intrastate, but which intrastate activities are so interwoven with its interstate business and activities that it is impossible to separate same, and that even if they could be separated, such separation and subtraction of intrastate activities would render the result untrue and inaccurate and of little or no value in enabling the commission to perform its regulatory duties and its other duties under the act, as to the interstate business and activities of these complainants and of others in said industries.

That any requirement by the commission for the segregation of the business of these complainants and others in the industry as to what is interstate and what is intrastate would be both unduly burdensome and probably impossible of accurate fulfillment, and that such consideration, as well as the necessity for full and complete information of all the activities of these corporate complainants engaged in interstate commerce was carefully considered in preparing and making the requirements sought to be permanently enjoined.

19. Defendants deny that the requirements that said reports be furnished are in any sense a regulation of the business of any complainant, or prescribe the manner of keeping books by complainants, but aver that the requirements are only for reports and results, which are either copies of records and statements already kept and made by complainants for their own uses, some of which are habitually given publicity by them, and all of which are or should be ordinarily kept by concerns such as complainants under the ordinary standards of good accounting as commonly recognized; that in some instances a segregation and totaling as to certain items is necessary, and that as to substantially all of such information and reports, the facts are necessary in the proper conduct of the business of each concern for their operating and sales departments, for the information of the directors and stockholders, and for the financing operations.

That one purpose of the requirements made in this case is the gathering of complete information, which is necessary in the proper regulation through publicity of the true facts as to the interstate business of the industry. That such purpose can not be properly performed without the acquisition of the complete facts. That the acquisition of the complete information and facts required will effectuate such purpose, in that the dissemination of such complete trade information will tend to prevent undue fluctuations and panic markets based on ignorance of the true facts, or based on incomplete and partial or self-interested information, published only whenever and in so far as it may serve those self-interested who may publish it. That regulation by publicity is, and for a long time has been, recognized as one form of regulation which has been generally conceded to be fair and equitable to all concerned. That unless such regulation through public dissemination of the full and complete facts is carried out, other more drastic forms of attempted regulations without proper information may follow.

That in addition to the regulatory effect, in and of itself, of such public dissemination of the complete facts, it is one of the purposes of these activities to gather and convey to Congress, for its information in the performance of its duties, the full and complete facts, in order that instead of legislating on incomplete or partial or prejudiced information, it may have the full facts before it. That if any regulatory effect upon intrastate commerce flows from such publicity, it is merely incidental to the general regulation of interstate commerce, as to which the power of Congress is complete.

That said activities were not carried out under the provisions of section 5, and did not, therefore, require any complaint to be made or formal proceeding to be instituted. That said activities were, how-

ever, being carried out by direction of the commission in accordance with statute under other provisions of the Federal Trade Commission act.

88 20. Defendants show to the court, that the results of the information required by the commission is now and will be during the immediate future of particular value to the public generally, to Congress, and to the trade for the reason that, as is common knowledge, price readjustments are at the present time very much out of line and harmony, and prices on steel and steel commodities have declined from the war prices much less than on many other commodities, whereas prices of many other commodities, notably agricultural commodities, to the producer, have declined down to or below pre-war prices (for example, oats and corn are selling in agricultural districts at twenty cents and less per bushel), that as a result of the general feeling that the price readjustments in the steel and iron industry are out of line, the people generally have stopped buying, or are buying only as little as possible, and that this has an effect, whether properly or improperly, upon the whole industrial and trade structure, and that it is, therefore, of prime importance that the truth and facts relating thereto be ascertained and made public—not so as to identify results as to any individual concern (and it is not the purpose or intention of the commission to publish facts so as to identify results of individual concerns), but the truth and facts as to the entire industry; and to disseminate such true facts, it is essential and necessary that the commission gather and compile the facts called for in its forms (which activities were temporarily enjoined in this suit).

Further answering and as showing the public need for the gathering of such information and its dissemination, defendants aver that during the year 1920, after the defendants were restrained by order of this honorable court from continuing such gathering, compiling, and dissemination of information as to coal, there occurred throughout the United States an unprecedented panic market and period of profiteering in coal, due in part to ignorance of the true facts, which facts defendants by pursuing its activities then enjoined were gathering and would have gathered, compiled, and disseminated.

It is further averred that since 1917 a large number of new concerns have entered the coal and steel industries, and for that reason the facts sought to be gathered and their dissemination are of particular value, both to those in such industries and interested in such commodities, and to the investing public.

FEDERAL TRADE COMMISSION ET AL.,

Defendants,

By JESSE C. ADKINS,

WILLIAM T. CHANTLAND,

Their Attorneys.

DISTRICT OF COLUMBIA, ss:

I, Nelson B. Gaskill, on oath say that I am one of the defendants in the above-entitled cause, and that I have read the foregoing answer and know the contents thereof, and that I verily believe the facts stated in said answer to be true.

NELSON B. GASKILL

Subscribed and sworn to before me, a notatry public in and for the District of Columbia, by Nelson B. Gaskill, this the 1st day of December, 1921.

[SEAL.]

WARREN R. CHOATE,

Notary Public in and for the District of Columbia.

(My commission expires April 5, 1923.)

89 *Motion to strike out certain matters from the amended answer and motion to strike the entire amended answer from the files.*

Filed Dec. 14, 1921.

* * * * *

Come now the plaintiffs and move that there be stricken from the amended answer, for the sundry reasons herein set forth in connection therewith, certain matters appearing therein as follows:

1.

That portion of *paragraph 4* after the semicolon, as follows:

"but defendants aver that the said resolution does not set forth their only source of authority for requiring the reports sought to be enjoined, but that the authority under which these defendants have proceeded is hereinafter more fully set forth."

for that said matter is impertinent in that, not denying their resolution and the issuance of the questionnaires in the form alleged, but admitting the same and having in their answer earlier filed admitted the allegation of the fourth paragraph of plaintiffs' bill and thereby admitted that their activities were intended to be conducted

only under paragraphs (a) and (b) of section 6 of the Federal Trade Commission Act, the defendant cannot now be heard to plead to the contrary, and for the further reason that said matter is redundant.

2.

That portion of paragraph 5 being the last complete sentence thereof, as follows:

"And these defendants aver that said forms for reporting were prepared with only such detail as this commission and competent accountants consider necessary to produce the information which the commission is authorized by the statute to obtain, viz, as to the organization, business, conduct, practices, and management of those engaged in the steel industry."

for the reason that said matter is impertinent, redundant, argumentative, and pleads, if at all, only matters of conclusion and of evidence.

3.

That portion of paragraph 9 as follows:

"As to the ninth paragraph of the bill, these defendants deny the allegations thereof, that they claim authority to perform the acts

complained of exclusively under paragraphs (a) and (b) of section 6 of the Federal Trade Commission act, and aver that they claim authority to perform said acts under paragraphs (a), (b), (f), and (g) of section 6 and under section 9 of said act, and under all the authority conferred upon the commission by Congress.

"Defendants deny the allegations of said paragraph, that the Federal Trade Commission ordered answers to said questionnaires solely and only for the purpose of gathering and compiling said information and publication; they aver that the Federal Trade Commission required answers to said questionnaires for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication and the consequent regulation of the interstate commerce of said complainants resulting from such publication of the true trade facts as to all of the business of complainants and of others engaged in commerce in those commodities, and including the purpose of making reports to Congress and of recommending additional legislation to Congress.

91 "Defendants allege that all of the information to be acquired through the answers to said questionnaires is necessary and has direct relation to regulation and control of the interstate and foreign commerce of complainants and others answering said questionnaires and is sought by the Federal Trade Commission for the purpose and in necessary aid of the regulation of said commerce.

"* * * but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provisions of said trade commission act."

for the reason that having in their answer admitted the allegations of paragraph 9 of the bill of complaint that they were acting under the exclusive authority of paragraphs (a) and (b) of section 6 of the trade commission act, and having admitted their resolution and the issuance of the questionnaires, in which they stated that they were acting solely under said authority, defendants can not now be heard to plead to the contrary; and for the further reason that said matter is impertinent, redundant, and argumentative.

4.

That portion of paragraph 10 as follows: The words "purchases and," at the end of the fourth line; and the words "and that the greater portion of the principal raw materials of each concern is purchased and transported in interstate commerce to their converting plants," which words are found in the ninth, tenth, and eleventh lines; and also the words "of purchases and," found in the twelfth line thereof, for the reason that the same are impertinent; and also separately that portion of paragraph 10 as follows:

"Defendants aver that each of complainants, with two or three exceptions, is engaged in interstate commerce in the purchase or production of raw materials and the assembly thereof at the place of processing them and in contracting for the sale of the product and the transportation thereof in interstate commerce. And these defendants further aver that the interstate and intrastate com-

92 merce of each and every of the complainants is conducted as a single, nonseparable whole."

for the reason that it is impertinent, redundant, and not responsive to any averment in paragraph 10 of said bill of complaint, and as to the last three lines is so vague, indefinite, and uncertain as to tender no issue of fact or law.

5.

Strike out all of paragraph 11 after the words "deny the allegations thereof," being in the second line thereof, as follows:

"and in refutation of the arguments therein advanced aver"

and subparagraphs (a), (b), (c), (d), (e), (f), (g), (h), (i), and (j), for the reasons that as stated said matter is argumentative, and also because it is impertinent and redundant.

Should the Court be of the opinion that the above motion as directed to paragraph 11 is too broad, then plaintiffs move to strike out separately portions of paragraph 11, as follows:

(1) All of subparagraph (a), for the reason that said matter is impertinent and argumentative.

(2) That portion of subparagraph (b) as follows:

"These defendants are advised by competent accountants that any industry having a reasonably accurate and comprehensive accounting system can, without change of its form or manner of bookkeeping, supply the information called for by the said questionnaires."

for the reason that the same is impertinent and a pleading of evidence.

(3) Also that portion of subparagraph (b) consisting of the last six lines, as follows:

"That as to the steel schedules and reports, they substantially and in fact require complainants to furnish information and make
93 reports only in so far as their records and method of keeping same enable them so to do, and defendants specifically deny that said requirements prescribe a different system of keeping records than is now employed by complainants, and aver that such requirements do not in fact prescribe any form of keeping records and books."

for the reason that the questionnaires attached to the bill of complaint on their face disclose that only as to a part of the items of information asked for were complainants relieved of furnishing the information in the event their methods of keeping their books and records did not enable them, without changing such methods, to furnish the same, and also because the same is an attempt to interpret documents, the interpretation of which is for the court, and as impertinent.

(4) Also subparagraphs (d), (e), and (f) for the reason that each is impertinent and argumentative.

(5) That portion of subparagraph (g) as follows:

"and any expression or additional statement made by the commission in Exhibit 'A,' in addition to the reference made therein and thereby to section 6, paragraphs (a) and (b) of the commission act

can not detract from nor destroy the presumption that these defendants have issued said questionnaires in accordance with law and for the uses and purposes expressed therein."

for the reason that said matter is impertinent, redundant, argumentative, and further objectionable for the reasons more particularly set forth in paragraph 1 and in paragraph 3 of this motion.

(6) That portion of subparagraph (b), being the latter part of the first full sentence, as follows:

"but are done and performed by virtue of a statute passed by the Congress of the United States and approved by the President thereof, the constitutionality whereof and the legality of the acts performed in pursuance thereof will be presumed until the contrary is established by a court of competent jurisdiction."

for the reason that said matter is impertinent, redundant, argumentative, and pleads, if at all, matters of presumption and 94 of which, if material, judicial notice is taken.

(7) That portion of subparagraph (h), being the last portion thereof, as follows:

"and aver that the contrary is not to be presumed against them. Defendants aver the fact to be that, as to the steel industry, these complainants cause to be published in a trade publication of that industry, the Iron and Steel Institute, many of the facts called for, and that as to coal, the National Coal Association, a trade association of that industry, did gather and disseminate much more complete information than that called for by defendants, but defendants aver that such dissemination was made largely directly to competitors or supposed competitors in the same industry, and that only such portions were given to the public as might be deemed advisable to those self-interested in the industry."

for the reason that said matter is redundant, impertinent, argumentative, and evidential.

(8) Subparagraph (i) as impertinent and redundant for the reason set forth in paragraphs 1 and 3 of this motion with respect to the admission made by the defendants in their answer as to the authority under which and the purpose for which the questionnaires were issued and regarding its resolution and the issuance of said questionnaires.

6.

All of subparagraph (a and b), subparagraph (c), and subparagraph (d) of paragraph 12 as redundant, impertinent, and argumentative.

7.

That part of paragraph 13, being the words "and refer to paragraphs 11 and 12 of this answer," as redundant.

8.

All of paragraph 15 as impertinent, redundant, argumentative, and, if material or pertinent, matters of which judicial notice is taken.

9.

95 All that portion of paragraph 16, save the first sentence thereof, said portion being as follows:

"That in the performance of its duties it is necessary for the commission to have the information called for both as to interstate and intrastate transactions of complainants and of others in such industries in order that the facts may be complete and accurate and not incomplete, partial, and inaccurate, and without value to the commission in the performance of regulatory powers granted by Congress under its act to the public, to the industries themselves, and to Congress.

"That the power of Congress to grant such powers to the Federal Trade Commission as an administrative body has been fully upheld by the Supreme Court of the United States as to power which more clearly involves purely intrastate activities of concerns which are engaged in interstate commerce than is granted by the Federal Trade Commission act and exercised by the commission and its predecessor, the Bureau of Corporations, under their acts and which are now enjoined by this court."

as impertinent, argumentative, and redundant.

10.

That portion of paragraph 17, being the last sentence thereof, as follows:

"That said activities are all directed toward the gathering and compiling of information from corporations incorporated under state laws, whose only privileges of engagement in interstate commerce beyond the boundaries of the state in which incorporated are and must be subject to the general, full, and complete powers of Congress of regulation of interstate commerce and its other powers under the Constitution, either expressed or implied, including its powers to promote the general welfare and to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States or in any department or officer thereof."

as impertinent, redundant, and argumentative.

11.

All that portion of paragraph 18 to the words reading "and that such consideration," etc., in the fourth line from the end, as so indefinite, vague, and uncertain as to tender no issue of fact or law, and the entire paragraph as impertinent and argumentative.

96

12.

All of paragraph 19 as redundant, impertinent, and argumentative.

13.

All of paragraph 20 as impertinent, redundant, and argumentative.

14.

Plaintiffs further move to strike said entire amended answer from the files for the reason that the defendants therein set forth many alleged presumptions of law and also matters of which, if material, judicial notice is taken; that it lacks sufficient, specific, and separate admissions or denials of the material allegations of the bill or specific and separate material averments of new matter; that the same so confuses statement and substance with impertinent, redundant, and argumentative matter as to violate the rules of pleading; and therefore said amended answer in the above respects violates rule 9 of the equity rules of this court.

And for the further reason that said amended answer tenders issues that were not raised by the bill of complaint; that are confusing, feigned, and false both in fact and in law; and said amended answer sets forth no defense to said bill of complaint.

LEVI COOKE,

A. LEO WEIL,

*Attorneys for Plaintiffs other than Midvale Steel
and Ordnance Co. and Cambria Steel Co.*

WM. WALLACE, JR., and

CHADBOURNE, BABBITT & WALLACE,

*Attorneys for Midvale Steel & Ordnance Company
and Cambria Steel Company.*

97 DISTRICT OF COLUMBIA,

City of Washington, ss:

A. Leo Weil, having been duly sworn according to law, deposes and says that he is one of the attorneys of record for said complainants and makes this affidavit in the place and stead of one of said complainants because none of them are present in the city of Washington at this time, that the foregoing motion has not been interposed for delay or other cause except that deponent and other attorneys of record are of the opinion and believe that the same is true in fact and good in law, and in the interest of the administration of justice ought to be submitted to the judgment of this court and further deponent sayeth not.

A. LEO WEIL,

Sworn to and subscribed before me this 13th day of December, 1921.

[NOTARY SEAL.]

JENNIE M. SHEFFER, *Notary Public.*

To: Mr. JESSE C. ADKINS and Mr. WILLIAM T. CHANTLAND, *Attorneys
for Defendants.*

Please take notice that we shall call the foregoing motion to the
attention of Mr. Justice Bailey, holding equity court, on

98 Wednesday, December 14th, 1921, at the opening of court or as
soon thereafter as counsel can be heard.

LEVI COOKE,

A. LEO WEIL,

Attorneys for Plaintiffs other than appearances below.

WM. WALLACE, JR., and CHADBOURNE,

BABBITT & WALLACE,

*Attorneys for Midvale Steel & Ordnance Company,
and Cambria Steel Company.*

Service of a copy of the foregoing motion is acknowledged this 13th day of December, 1921.

JESSE C. ADKINS,

WM. T. CHANTLAND,

Attorneys for Defendants.

99

Memorandum of Court.

Filed Feb. 8, 1922.

1. As to plaintiffs' motion to strike out certain parts of the amended answer:

While the amended answer is in part argumentative and at times pleads conclusions of law rather than facts, yet in order to present the defense as a whole these averments are not necessarily impertinent. As to the averments which plaintiffs claim are contradictory to the original answer, it may be said that the matters involved in this suit are of wide public interest and the defendant Commission is charged with a public duty, and the matters in controversy should be fully settled as soon as possible and without further litigation.

For these reasons this motion will be overruled, without prejudice to the right of the plaintiff on the further hearing on the second motion to raise objections to matters not properly pleaded.

2. As to the motion to strike the entire answer:

Under the rules and practice in equity prior to the present rules there is no question but that no demurrer to an answer would lie, nor was there any way of testing the sufficiency of an answer as a defense but by setting down the case for hearing on bill and answer.

An answer was evidence as well as a pleading and on hearing
100 on bill and answer, the answer being evidence, the hearing was final. Even where the bill waived an answer under oath, and an unverified answer was filed, the same rule was followed where the hearing was on bill and answer. This was expressly provided for in the rules of the United States Supreme Court (Equity Rule 41).

"If the complainant in his bill shall waive an answer under oath, ——— the answer of the defendant, though under oath ——— shall not be evidence in his favor unless the cause be set for hearing on bill and answer only ———."

This provision of the former rules was not carried into the present rules. An answer, although verified (excluding answers to interrogatories), is no longer evidence. While the sufficiency of a plea (which was never evidence) could be tested by setting it down for argument, under the new rules the matter of a plea must be incorporated in the answer and the plea becomes a part of the answer.

In my opinion, by analogy to the former practice in regard to pleas, the sufficiency of the matters of both pleas and answers as defenses may be tested by proceedings in the nature of setting down the same for argument or by a motion to strike, the latter being more in accordance with the present methods of testing the sufficiency of bills and cross claims. In *Shera v. Merchants Life Ins. Co.*, 237 Fed. 484, the same view of the present practice is taken.

Counsel for defendant at the last hearing stated that they were not prepared to argue the case if the motion filed by plaintiffs were treated as a demurrer to the answer. Therefore a day will be set for argument upon the motion. Inasmuch as many of the questions

involved were fully argued before me in the case of Maynard Coal Co. v. Federal Trade Commission, the argument will be limited to points which counsel may contend differentiate the present case from that one; and in this connection I call counsels' attention to the case of Crescent Cotton Co. v. Mississippi, decided by the Supreme Court on October 17, 1921.

JENNINGS BAILEY, *Justice*.

102 *Order making John F. Nugent party defendant.*

Filed March 1, 1922.

* * * * *

The court being informed that William B. Colver and John Garland Pollard, defendants herein, are no longer members of the Federal Trade Commission, and the court being informed by counsel for both parties that John F. Nugent has become a member of said Federal Trade Commission, and attorneys for plaintiffs having moved that said John F. Nugent be made a party defendant, it is this 1 day of March, 1922, ordered that said John F. Nugent be made a party defendant.

JENNINGS BAILEY, *Justice*.

Answer of John F. Nugent, commissioner.

Filed March 1, 1922.

* * * * *

Comes now John F. Nugent, who having heretofore by order of court been made a defendant in the above cause as a member of the Federal Trade Commission, and hereby adopts the amended answer heretofore filed by the Federal Trade Commission and the other present members of the Federal Trade Commission as his answer, and joins therein as such member for all the purposes of said cause.

JOHN F. NUGENT.

103

Stipulation.

Filed March 1, 1922.

* * * * *

The following stipulation is signed so as to make matter of record what was orally agreed to by the attorney for the defendants and the attorney for Midvale Steel and Ordnance Company and Cambria Steel Company during the oral argument:

First. Defendants agree that for all the purposes of this case the condition in Schedule 7 of the questionnaire, reading, "if you have made any estimate or actual allocation" would relieve any addressee

of the need for furnishing any of the information called for by that schedule, provided it was not already assembled.

Second. The Midvale Steel and Ordnance Company and the Cambria Steel Company agree for all the purposes of this action that the expense involved to them of furnishing the information called for by the reports, schedules, and questionnaires complained of (with the above qualification as to Schedule 7) would not be either unconscionable extraordinary or unusual and that such expense shall not be made in this action the basis of a claim that the fifth amendment has been violated. Other grounds for alleged violation of the fifth amendment are reserved.

Other than as above any question of the power of the commission to require and receive this information shall not be affected by this stipulation.

Dated February 18, 1922.

WILLIAM WALLACE, JR.,
*Attorney for Plaintiffs, Midvale Steel &
Ordnance Co. and Cambria Steel Company.*
JESSE C. ADKINS,
WM. T. CHANTLAND,
Attorneys for Defendants.

104

Stipulation.

Filed March 1, 1922.

* * * * *

It is agreed and stipulated by the attorneys for the plaintiffs, except Midvale Steel and Ordnance Company and Cambria Steel Company, with the attorneys for the defendants, that the reports and questionnaires involved in said complaint and under consideration in the form submitted by said Federal Trade Commission to plaintiffs do not present the difficulties as to the question of outlay and expense charged in the 11th paragraph of the bill of complaint under subparagraph (j), and in the 12th paragraph of said complaint, under subparagraph (d), and that under the form of said reports and questionnaires it will not be contended by plaintiffs that they entail upon the plaintiffs any extraordinary or unreasonable outlay or expense in filing the answers thereto if the said Federal Trade Commission be entitled to demand such answer.

A. LEO WEIL,
LEVI COOKE,
Attorneys for Plaintiffs.
JESSE C. ADKINS,
WM. T. CHANTLAND,
Attorneys for Defendants.

MARCH 1, 1922.

105

Final decree.

Filed March 10, 1922.

The above-entitled cause having come on to be heard upon plaintiffs' motion to strike out certain parts of the amended answer and to strike

the entire amended answer from the files, and it appearing to the court, from the papers and from the oral argument, that the amended answer of the defendants, the Federal Trade Commission, and Nelson B. Gaskill, Huston Thompson, and Victor Murdock as commissioners, was intended to and did replace the original answer of all of the original defendants in said suit, and John F. Nugent, commissioner, heretofore made a party defendant herein, having answered and adopted said amended answer as his answer in this suit:

And said motions of said plaintiffs having been fully argued and submitted by counsel for plaintiffs and defendants, and the court having considered said motions and having heretofore rendered its opinion in which it reserved decision upon the motion to strike the entire amended answer from the files, in order to permit counsel, if they should so desire, to present further arguments, and the court having been advised that no such further argument is desired,

It is now, this 10 day of March, 1922, by the court ordered:

106 First. That the motion to strike out certain parts of the amended answer be overruled without prejudice to the right of the plaintiffs on any further hearings in said suit to raise objections to matters not properly pleaded.

Second. That the second motion to strike the entire amended answer from the files be, and the same is hereby denied, except as to the ground that the said amended answer set forth no defense to the bill of complaint.

Third. And it is further adjudged, ordered, and decreed that the said amended answer does not state a defense to said bill of complaint; and the court, having asked defendants' counsel whether they could further amend in substance their amended answer and counsel for defendants having stated that said amended answer stated their full defense, and it therefore appearing to the court that said amended answer was not further amendable in substance.

Fourth. It is now, therefore, further adjudged, ordered, and decreed that the said motion to strike the said amended answer be, and the same is hereby granted on the ground that the said amended answer does not state a defense; to which ruling, order, and decree set forth in this and the preceding paragraph, the defendants note an exception on the ground that the rules and practice of this court do not provide for striking out the entire amended answer for insufficiency and on the ground that said amended answer states a sufficient defense to the bill of complaint, which exception is hereby allowed.

Fifth. And defendants, having elected to stand upon their said amended answer and not to answer further, and having excepted to the rulings, order, and decree of the court that said amended answer does not state a defense and granting the motion to strike out the same for that reason; and the defendants having moved to
107 vacate the said ruling, order, and decree holding that the amended answer does not state a defense and granting the motion to strike out the same, and having moved to proceed to the taking of testimony and the hearing of this case upon the issues raised by the bill of complaint and said amended answer.

It is further adjudged, ordered, and decreed that the said motions be, and they are hereby denied, to which ruling, order, and decree the defendants note an exception, which is hereby denied.

And, upon motion of the plaintiffs, the court now, therefore, proceeds to make and enter a final decree herein, and adjudges, orders, and decrees as follows:

1st. That the temporary injunction heretofore granted be made final.

2nd. It appearing from the bill of complaint herein that on or about December 15, 1919, the defendant commission adopted a resolution whereby it resolved to collect and publish from time to time current information with respect to the production, ownership, manufacture, storage, figures of cost and wholesale and retail prices of products and by-products of various basic industries, including coal and steel, and with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke, and pig iron industries;

And it further appearing from said Bill of Complaint that thereafter the commission, by written orders, directed the plaintiffs herein to make to the commission monthly reports of their monthly costs of production for the several products of the plaintiffs designated in, and other data specified in, forms of reports or questionnaires (or schedules, so called) which accompanied said orders,

108 including detailed information regarding the quantity production by the several complainants of the products produced by them, respectively, the sales and contract prices thereof, the orders booked by them, respectively, the sales and contract prices thereof, the orders booked by them, the amounts allocated by them to depreciation and administrative and selling expenses, and also to file with the commission quarterly income statements and balance sheets;

And it further appearing from said bill of complaint that the plaintiffs having failed to make said reports the commission by other written orders threatened the imposition of penalties for delay or failure in respect thereof;

And it further appearing that the commission and the other defendants herein filed an amended answer herein, in which they, among other things, admitted the adoption by the commission of said resolution and the issue by it of said orders, and asserted that the commission is authorized by the Federal Trade Commission act, approved September 26, 1914, and otherwise by law, to require the plaintiffs to make said reports and to furnish said information to the commission;

Wherefore defendants, Nelson B. Gaskill, Huston Thompson, Victor Murdock, John F. Nugent, and Federal Trade Commission and all its members, agents, assistants, deputies, employees, attorneys, and all persons acting by, through, or under said defendants, or any of them, are hereby enjoined and restrained from enforcing or attempting to enforce in any manner against any of the plaintiffs herein, or against any person acting or claiming to act for any of them, said resolution and orders in so far as they require or purport to require the complainants herein to make said reports as aforesaid, and from requiring that answers be made by or on behalf of any of the plaintiffs herein to said reports or questionnaires, and from requiring any

109 of them otherwise to furnish to the defendants, or any of them, the costs of production for its products, its by-products, or of any thereof or the other information aforesaid, or any thereof, including income statements and balance sheets, and from

demanding or taking any steps to demand from any of the plaintiffs herein, or to secure, the furnishing to the defendants, or any of them, of any data whatsoever with respect to the manufacture, production, ownership, or storage of any of its products or by-products, or any thereof, or with respect to the cost or sale prices thereof, for the reason that the defendant Federal Trade Commission could not constitutionally be authorized and has not been authorized by law to require or to demand said reports and answers or to demand that it be furnished with said information and data.

3rd. That the plaintiffs have and recover of said defendants the plaintiffs' costs of said suit.

4th. To this decree and to each part thereof, except that contained in paragraphs first and second, which overrules and denies certain parts of plaintiffs' motion, the defendants note an exception, which is hereby allowed.

JENNINGS BAILEY, *Justice*.

From the foregoing decree, except paragraphs first and second thereof, the defendants in open court note an appeal to the Court of Appeals of the District of Columbia, which is hereby allowed, and the bond for costs on appeal is hereby fixed at one hundred dollars, or the amount of cash which may be deposited in lieu of such bond is fixed at fifty dollars.

JENNINGS BAILEY, *Justice*.

1922, Mar. 17, \$50, deposited by Deft. No. 1 in lieu of bond on appeal.

WTC/CSV 3-1-22.

110

Memorandum opinion of court.

Filed March 18, 1922.

* * * * *

In the memorandum filed February 8, 1922, I referred to the decision in the case of Maynard Coal Co. v. Federal Trade Commission, reported in 48 Washington Law Reporter, 278, and I adopt that opinion as my opinion in this case, so far as applicable.

BAILEY, J.

111

Opinion of court.

Filed Apr. 19, 1920.

* * * * *

This is an application for an injunction to restrain the Federal Trade Commission from taking steps to collect a penalty for failure on the part of the plaintiff, the Maynard Coal Company, to make certain reports called for by the commission. The bill is supported by several affidavits of expert accountants. The defendant commission has filed its answer, but on account of insufficient verification it can not be treated as an affidavit. It has also filed with its answer several affidavits, which will be noticed hereafter.

The plaintiff is a corporation engaged in the mining, production, and sale of bituminous coal. It owns and operates mines in Ken-

tucky and Ohio. Practically all of the coal mined in Kentucky and about one-half of the coal mined in Ohio is shipped to points within those states and the remainder of that mined in Ohio to points in that state. On January 31, 1920, the defendant commission served upon a large number of coal mining corporations, including the plaintiff, an order requiring them to report "monthly costs of production and other data," as set out in specifications accompanying the order, for each calendar month of the year 1920 and until further notice. The information and reports required are very full and detailed as to production, sales, management, financial condition, depreciation, etc., and all to be calculated as prescribed in the specifications. The plaintiff claims, and from the affidavits filed such appears to be the fact, these reports cannot be made without a large change in the plaintiff's method of bookkeeping and accounting and at a very considerable expense.

The commission claims that it may require these reports, under the authority placed in it by the act of Congress creating the commission, approved September 26, 1914, and that Congress has the authority to so empower the defendant under the clause known as the Commerce Clause of the Constitution of the United States.

"Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

The parts of the Federal Trade Commission act pertinent to this inquiry are substantially as follows:

Commerce is defined, section 4, as "commerce among the several states or with foreign nations, or in any Territory of the United States or with foreign nations, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation."

Section 5 provides that unfair methods of competition in commerce shall be unlawful, and empowers the commission to take steps to prevent such unfair methods and prescribes the procedure for carrying out such purpose.

112 Section 6 of the act provides: "That the commission shall have power—

(a.) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b.) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers, subject to the act to regulate commerce, or any class of them or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and in-

dividuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable time as the commission may prescribe unless additional time be granted in any case by the commission."

Subsection *c* authorizes the commission, when a final decree has been entered against a corporation under the antitrust acts, to investigate the manner in which the decree is being carried out.

Subsection *d* authorizes the commission, upon direction of the President or either House of Congress, to investigate alleged violations of the antitrust acts.

f. "To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best for public information and use."

g. "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this act."

h. "To investigate from time to time trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

The defendant in its answer admits "that no complaint has been filed by or before it charging the plaintiff with unfair methods of competition or with the violation of the Federal Trade Commission act or the antitrust acts and admits that the information sought to be secured from the plaintiff may not throw any light or have any bearing upon any possible violation of any of the acts aforesaid, but asserts that such information is sought for a lawful purpose within the scope of the powers conferred upon the defendant by section 6 of the said commission act.

113 The authority of Congress to enact this legislation is claimed under the power to regulate commerce above set out. The reports demanded of the plaintiff are not limited to questions connected with the shipment of coal in interstate commerce or the contracts in reference to, or the prices of coal so shipped, but relate almost entirely to the mining of coal and the price at which it is sold, and the financial condition and operations of the company, and all without any attempt to limit the inquiry to matters pertaining to the coal shipped in interstate commerce. In fact the commission in its answer "denies that the plaintiff has the right to segregate its business and to say that part of its business is interstate and part is intrastate, but in order to ascertain if defendant is engaged in commerce, the courts will look to the entire business transactions of the plaintiff, and if any part of its business is intrastate and a part interstate and the whole business is conducted under one organization as is set forth and admitted in the plaintiff's bill, then

the defendant insists that the plaintiff, considering its business as a whole, (is engaged in) interstate commerce and the defendant has the right to ask the information sought.

And the information sought in this case is such as would apply as well to a corporation whose business was wholly intrastate as to the plaintiff. The defendant unquestionably is demanding information as to intrastate commerce and as to coal production, and frankly asserts the right to do so.

That there is a radical distinction between production and commerce is clear.

In *Kidd vs. Pearson* (128 U. S. 1) Mr. Justice Lamar said, page 20:

"Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile vs. Kimball*, 102 U. S. 691, 702, is as follows: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest and the cotton planter of the South plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management."

111 In *United States vs. Knight*, 156 U. S. 1, page 12, Mr. Chief Justice Fuller said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it."

In *Addyston Pipe & Steel Co. vs. United States*, 175 U. S. 211, which involves the Anti-Trust Act of July 2, 1890, Mr. Justice Peckham, after holding that Congress, under the power to regulate interstate commerce, could regulate any agreement or combination that operated

upon the sale, transportation, and delivery of an article of interstate commerce, on page 27, said:

"Although the jurisdictions of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate.

In regard to such of these defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the State, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, although it should happen that some nonresident of the State eventually obtained it."

In *Delaware, Lackawanna & Western Railroad Co. vs. Yurkonis*, 238 U. S., 439, a case involving the Federal employers' liability act, Mr. Justice Day, page 444, said:

"The averments of the complaint as to the manner of the receiving of the injury by plaintiff showed conclusively that it did not occur in interstate commerce. The mere fact that the coal might be, or was intended to be, used in the conduct of interstate commerce after the same was mined and transported did not make the injury one received by the plaintiff while he was engaged in interstate commerce. The injury happening when the plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce facts essential to recovery under the employers' liability act."

In *Coe vs. Erroll*, 116 U. S., 517, it was held that logs cut in New Hampshire and hauled to Erroll, N. H., to be transported to Maine, were not in interstate commerce. Mr. Justice Bradley, page 525, said:

115 "When the products of the farm or forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for transportation, but taxed without

any discrimination, in the usual way and manner in which such property is taxed in the State."

On page 528, he said:

"It is true, it was said in the case of the *Daniel Ball*, 10 Wall, 557, 565: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced, but this movement does not begin until the articles have been shipped or started for transportation from the one State to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence, is no part of the journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying from the farm or forest to the depot is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State it is matter altogether in fieri, and not at all a fixed and certain thing.'"

In order for the Federal Trade Commission to have the power to inquire the plaintiff to make reports as to the mining of coal and as to its intrastate shipments, it must appear that this information is necessary to or connected with some object over which the general Government has power. There is no claim made that there is any proceeding pending, involving the antitrust act, or unfair methods of competition, or under the Clayton Act, but in its order defendant demands reports in all the business of the plaintiff.

The defendant relies upon the visitorial powers of Congress over corporations. In this connection it must be borne in mind that the power of Congress over an instrumentality of commerce, such as a common carrier, is far different from its powers over an ordinary business corporation which merely ships its products or a portion of its products over such carrier. In fact, as said by Mr. Justice Holmes in *Smith vs. Interstate Commerce Commission*, 245 U. S. 33, on page 45, "It is not far from true—it may be it is entirely true, as said by the commission (referring to the Interstate Commerce Commission)—that there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

Apart from the fact that plaintiff is a corporation, it is clear that Congress could not compel the production of the private books and papers of a citizen, except in the progress of judicial proceedings.

Kilbourne vs. Thompson, 103 U. S., 168.

Harriman vs. Interstate Commerce Commission U. S., 211 U. S., 407.

116 Mr. Justice Field, then sitting on the Circuit Court, in the case of *In re Pacific Railway Commission*, 32 Federal Reporter, 241, said (page 250):

"And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that Congress may authorize

a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. In the pursuit of knowledge it can not compel the production of the private books and papers of the citizens for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence these books and papers contain." (And again on page 254:)

"But in accordance with the principles declared in the case of *Kilbourne vs. Thompson*, and the equally important doctrines announced in *Boyd vs. U. S.*, the commission is limited in its inquiries as to the interest of these directors, officers, and employees in any other business, company, or corporation to such matters as these persons may choose to disclose. They can not be compelled to open their books, and expose such other business to the inspection and examination of the commission. They were not prohibited from engaging in any other lawful business because of their interest in and connection with the Central Pacific Railway Company, and that other business might as well be the construction and management of other railroads as the planting of vines, or the raising of fruit, in which some of these directors and officers and employees have been in fact engaged. And they are entitled to the same protection and exemption from inquisitorial investigation into such business as any other citizens engaged in like business."

But the commission claims that, inasmuch as the plaintiff is a corporation, it has the authority claimed under the visitorial power of Congress. That the power sought is visitorial in its nature is clear, for in order to give the information and make the reports required it will be necessary—that it is, so appears from the affidavits on file—for the plaintiff to keep records and books in addition to those now kept by it and by other corporations engaged in a like business, at a considerable expense, and to make monthly reports based on calculations made from such records. This is not the simple obligation of a witness under a subpoena duces tecum, to answer questions and to produce books and records for inspection, but in addition to keep records and make calculations and reports. Such a burden can not be imposed upon an ordinary witness.

Northern Pacific Railway Co. vs. Keyes, 91 Federal Reporter

47.

4 Wigmore No. 2203, page 2989.

The commission contends that the order served upon the plaintiff does not undertake to prescribe methods of bookkeeping, nor to keep additional records, but under the allegations of the bill and the affidavits filed, I am of the opinion that this contention can not be sustained. The plaintiff can not comply with the orders of the commission without changing its methods of bookkeeping. That the act un-

undertakes to vest such powers (certainly as to matters connected with interstate commerce) in the commission is clear from section 10 of the act which provides penalties for any person who shall willfully "neglect or fail to make, or cause to be made, any false entry in any account, records, or memorandum kept by any corporation subject to this act, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation." These powers could only be justified under visitorial power.

It has been held that Congress has such visitorial power over corporations engaged in interstate commerce in *Wilson vs. U. S.* 221 U. S. 361, and in *Ellis vs. Interstate Commerce Commission*, 237 U. S. 434, but in these cases the power was limited to that portion of the business which was under the control of the Federal Government. No such power would seem to exist, however, as to other matters, and the two cases referred were cases in which subpoenas duces tecum has been issued, requiring the production of a corporation's books in the one case before a grand jury investigating charges of fraudulent use of the mail and in the other before the Interstate Commerce Commission. And in the latter case the court, through Mr. Justice Holmes, on page 444 (237 U. S.) said:

"If the price paid to the Armour Car Lines was made the cover for a rebate to Armour & Co., or if better cars were given to Armour & Co. than to others, or if, in short, the act was violated, the railroads are responsible on proof of the fact. But the only relation that is subject to the Commission is that between the railroads and the shippers. It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor. It was argued that the Commission might look into the profits and losses of the Armour Car Lines (one of the matters inquired about) in order to avoid fixing allowances to it at a confiscatory rate. But the commission fixes nothing as to the Armour Car Lines except under No. 15 in the event of which we shall speak."

"The appellant's refusal to answer the series of questions put was not based upon any objection to giving much of the information sought, but on the ground that the counsel who put them avowed that they were the beginning of an attempt to go into the whole business of the Armour Car Lines—a fishing expedition into the affairs of a stranger for the chance that something discreditable might turn up. This was beyond the powers of the commission. In *re Pacific Railway Commission*, 32 Federal Reporter 241. *Interstate Commerce Commission vs. Brimson*, 154 U. S. 447, 479. *Harriman vs. Interstate Commerce Commission*, 211 U. S. 407. The Armour Car Lines not being subject to regulation by the commission, its position was simply that of a witness interested in but a stranger to the inquiry, and the commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice. Therefore the matter to be considered here, subject to the qualification that we are about to state, is how far an ordinary witness

could be required to answer the questions that are before the court."

In the case of a corporation doing a wholly intrastate business, could it be said that Congress has any visitorial power under the commerce clause of the Constitution of the United States? Clearly it has not. The fact that it happens to be the same corporation in this instance which mines and ships the coal does not give Congress any greater powers to regulate production and the intrastate commerce of such corporation. The visitorial power of Congress is limited to that part of the business over which it has control, and which under the Constitution it has the power to regulate.

118 In *Hammer vs. Dagenhart*, 247 U. S. 251, it is said (page 260).

"While the power to regulate commerce among the several States is in the same grant and in the same terms with the power over foreign commerce, yet there is a difference with respect to the extent of that power growing out of the difference in the relation of the United States to the two kinds of commerce, and the difference in the right of the citizen of the United States and the foreigner to engage therein. As to foreign commerce, the United States possesses and exercises all the attributes of sovereignty. As to interstate commerce, it exercises only that portion of sovereignty delegated to it."

(And again, page 261.)

"However much the *Knight Case*, 156 U. S. 1, may be weakened by later decisions, its distinction between production and commerce is still effective to prevent direct congressional regulation of production as distinguished from sale and transportation."

The power claimed by the commission is vast and unprecedented. The mere fact that a corporation engaged in mining ships a portion of its product to other States does not subject its business of production or its intrastate commerce to the powers of Congress. Doubtless the business of every coal-mining corporation, whether engaged in intrastate business or not, to some extent affects interstate prices and commerce, but, as stated in *U. S. vs. King*, 156 U. S. 1 (above), "The power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense." No sound reason is given why there is any difference in the business of coal mining of a corporation which ships its coal to another State and that of a corporation which does not. Interstate commerce is not affected any more in the one case than in the other.

In the case of *United States vs. Basic Product Co.*, 260 Federal Reporter, 472, in which it was urged that Section 6 of this act was unconstitutional, not only in so far as it authorized investigation and compulsory disclosure of matters which are beyond the commercial powers of Congress, but also in so far as it attempted to authorize a search or seizure by an administrative agency of the Government without charge or suspicion, Justice Orr of the District Court of the Western District, Pennsylvania, said:

"While the contention of counsel is probably sound, this court does not deem it necessary to go further than to hold that the

commission has not the power to carry on investigations which it has assumed in the present case."

In the same decision he also said:

"Imagination, if not experience, can suggest that persons, partnerships, and corporations may be engaged in interstate commerce by the transportation of merchandise solely by water; that their activities may give them their income from lighterage; or they may be engaged in the sole business of forwarding goods, with no interest in the vessels or wagons on which they are transported. The foregoing are merely the illustrations of activities which may perhaps be within the scope of the powers granted to the commission by the act as found in the fifth section thereof."

"Imagination, however, can not suggest such an extension of constitutional limitation as may justify the investigation undertaken by the commission in this case. Indeed, so far as it has been brought to the attention of the court, no such assertion
119 of power has ever been made to the courts. Investigation under subdivision *a*, section 6, is limited to corporations engaged in interstate commerce. The defendant is engaged in manufacture."

I am of the opinion, therefore, that no such visitorial power as that claimed by the commission in the instant case has been vested in Congress by the Constitution, nor could Congress delegate such power to the commission.

But did Congress undertake to vest such power in the commission? It is the duty of the courts, if possible, to give the statute a construction which would not conflict with the Constitution.

Knight Templar Co. vs. Jarman, 187 U. S. 197, 205.

The corporations referred to in the act are by its terms limited to those engaged in "commerce" as defined in the act, and all the powers vested in the commission should be and, it seems, may be construed with this limitation. But the commission has undertaken to construe the act otherwise and to take steps under its construction of the act to require information and reports not relating to interstate commerce, but relating chiefly or wholly to production; and under its order the information which it has the power to demand can not be separated from that over which it has no control. While as to other matters, as stated in *In re Pacific Railway Commission*, supra, Congress may authorize the commission to obtain information upon any subject which, in its judgment, it may be important for it to possess, it may not compel the production of such information in respect to matters over which the federal government has no control.

It follows, therefore, that the commission can not compel the making of the reports which it has demanded of the plaintiff.

The plaintiff further contends that this power of the commission has been taken away by Presidential order. Much proof, in the form of affidavits, has been introduced by the defendant to show contemporaneous constructions of this order and that the power claimed by the commission in this case was not taken from it. The order is ambiguous, but, in view of my opinion as to the power of the commission, it is not necessary to decide this question in passing upon the application for a preliminary injunction.

Section 10 of the act provides that "if any corporation required by this act to file any annual or special report shall fail to do so within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

The plaintiff has failed to file the report demanded, and the commission has notified it that steps will be taken to recover the penalty prescribed above. The jurisdiction of a court of equity is not questioned by the defendants, and as I am of the opinion that the commission has not the power to exact the reports and information sought, the injunction prayed for will issue upon plaintiff executing bond with surety to be approved by the court in the penalty of \$5,000.

JENNINGS BAILEY, *Justice*.

120

Assignments of error.

Filed March 20, 1922.

The court, in this case, erred as follows:

1. In refusing to hear testimony and to go to trial on the pleadings.
2. In holding that the motion to strike out the amended answer, on the ground that it did not state a defense, was analogous to setting down the case for hearing on bill and answer, or to a motion to strike out under rule 39, and equivalent to a demurrer.
3. In holding that the amended answer did not state a defense to the bill of complaint.
4. In granting the motion to strike out the amended answer and in denying defendants' motion to vacate the order granting the motion to strike the amended answer and to take testimony, and to go to trial on the bill of complaint and the amended answer.
5. In making and entering the final decree and injunction and in entering the judgment for costs against defendants.
6. In not holding that Congress, under the Constitution, has full authority and power to grant, and does by the Federal Trade Commission act grant, to defendants the power to gather and compile full and complete information, among other things, of the business of plaintiffs (which are corporations engaged in commerce, as defined in said Federal Trade Commission act), including the information called for in the reports, schedules, and questionnaires complained of by plaintiffs, whether the same relates to or is a part of interstate commerce, or whether the same includes matters which relate
121 to or are a part of the local intrastate business of corporations engaging in interstate commerce.
7. In not holding that the powers exercised by the commission and the activities enjoined in this case are within the commerce clause of the Constitution.
8. In not holding that the power of Congress to authorize the gathering and compiling of information and/or to authorize the

requirement of reports from corporations engaged in interstate commerce as to the organization, business, conduct, practices, management, and relation to corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing extends to all matters directly or indirectly affecting the levying and collecting of taxes, borrowing of money, fixing of standards for weights and measures, promoting the useful arts by granting patents of monopoly for limited terms, raising and supporting armies, providing and maintaining a navy, and to all matters touching the promotion of the general welfare and making provision for the common defense, and the making of any laws necessary and proper to the exercise of these or any other legislative powers conferred by the Constitution upon Congress.

9. In not holding as a fact that coal and steel and its products are basic and necessary commodities of general and constant use throughout the United States, and in not holding that the business and trade in such commodities are affected with a general public interest and use, such as to entitle the supreme authority, the Nation, in this case through defendants, to complete and accurate information of all facts relating thereto, regardless of whether they relate to interstate trade or partly to interstate and partly to intrastate matters or whether they relate entirely to matters intrastate.

122 10. In holding that the requiring of such reports and answers to questionnaires and compliance with such requirement was an unlawful and unwarranted interference with or regulation of plaintiffs' purely local, private, intrastate affairs, businesses, and rights.

11. In not holding that plaintiff corporations engaging in commerce have no rights, either under the tenth, fourth, or fifth amendments to the Constitution, which are or can be violated by being required to furnish the information as to their business which is called for in the reports, answers, and questionnaires.

12. In not holding that the data called for by the reports complained of were not trade secrets within the meaning of the law and of the Federal Trade Commission act and in not holding that even though they were defendants were entitled, under the circumstances, to the information, where no disclosure thereof as to any individual complainant was contemplated, and in not holding that the disclosure contemplated, in the form of aggregate results as to trade and industry, was not disclosing either trade secrets or the secrets of business, or the unlawful interference with, or the taking away any constitutional or lawful right of any plaintiff.

13. In not holding that the due process clause of the fifth amendment to the Constitution and the fourth amendment relate only to natural persons and to criminal proceedings, and therefore have no application in this case, which relates to a civil, administrative matter touching corporations.

14. In holding that the Federal Trade Commission act does not confer authority upon defendants to require plaintiffs to make the reports and furnish the information called for in the schedules
123 complained of in the bill of complaint, and in holding that the Federal Trade Commission act, when construed to give defendants such power, is unconstitutional in that respect, and in not

holding that corporations which have elected to engage in interstate commerce may lawfully be required to furnish information as to their entire business.

15. In not holding that the gathering, compiling and making public of the general results of the information called for in this case is a purpose definitely authorized by the Federal Trade Commission act and is in aid of that recognized regulation of commerce which results through general publicity of full facts as to an entire trade and industry.

16. In not holding that the information called for is information respecting interstate commerce or information which has such a direct bearing upon interstate commerce as to be necessary, in order that defendants may properly perform their duties and regulatory functions relating to the interstate commerce and business of plaintiffs and all other corporations engaged in the same trade and business, and to prevent inconsistent State regulation thereof, and that if any interference with or regulation of the local or intra-state affairs or business of any of the plaintiffs result such interference and regulation is incidental and lawful.

17. In not holding that the plaintiff corporations are in business primarily for the purpose of selling and shipping their products in interstate commerce, and that the business of each is a unit, and that the business of each of said plaintiffs in its entirety is so interwoven that it is impracticable and/or impossible to segregate the required information as to the interstate portion of plaintiffs' business from that which is intrastate, and that it is therefore necessary for

124 defendants, in order to properly perform the duties imposed upon them, within the power of the Federal Government, to have complete information as to the total businesses and trade of each of the plaintiffs, and that if any interference or regulations as to matter purely intrastate results it is incidental and lawful.

18. In not holding that information respecting the costs, whether of manufactured or purchased commodities sold in interstate commerce, is information respecting such commerce, and in not holding that information regarding costs of production, prices, investment, and earnings, whether considered severally or combined into a single report, have, primarily, relation to the profits of trade and to the conditions of trade and commerce; that costs of production, in particular, have relation especially to prices and the profits of trade; and that each of these data relate only secondarily to manufacture or production as particular stages in such flow of trade and commerce.

19. In not holding that information and data necessary to substantiate or check the accuracy of figures of costs submitted in response to the requirements of the Commission relating to the commodities sold in interstate commerce is information respecting plaintiffs' interstate commerce.

20. In not holding that although bookkeeping and financial records are not interstate commerce, the defendant Commission, charged with certain duties as to all corporations engaged in interstate commerce (except banks and common carriers) is entitled to and must have from complainant corporations which engage substantially in interstate commerce the complete information and knowledge of how such business is carried on, and the nature, extent, and the costs of

125 said business as disclosed by such books and records, and must otherwise fully inform itself as to all of said business so as to enable the commission properly to perform the duties and regulatory functions within its authority.

21. In holding that because manufacturing is not commerce, the Federal Government in this case, speaking through defendants, has no power to secure information relating to a manufacturing stage or process in the business of corporations which engage substantially in interstate commerce in their manufactured or converted products, and in holding that the procurement of such information is either a direct and substantial regulation or any attempt at regulation of matters which are not commerce.

22. In not holding that the authority to require annual and special reports justifies the requirement of monthly or quarterly reports as well as reports of a more sporadic character.

23. In not holding that the mere gathering and compiling of the required information is not in and of itself regulation of or undue and unlawful interference with the business of plaintiffs.

24. In not correctly distinguishing between proceedings under section 5 of the Federal Trade Commission act and investigation and the powers under section 6 and other sections of the said act to gather, compile, and publish information as to the business of all corporations engaging in interstate commerce (except banks and common carriers).

25. In not holding that the word "business" in section 6(a) of the Federal Trade Commission act comprehends all matters relating to capacity, production, and movement of commodities and all commercial and financial records, transactions, and facts, including costs, sale prices, contract prices, investments, receipts, 126 and disbursements, earnings, and profits, or losses.

JESSE C. ADKINS,

WM. T. CHANTLAND,

Attorneys for Defendants.

Designation of record.

Filed March 20, 1922.

* * * * *

The clerk will please prepare the transcript of record on appeal herein and will include therein the following papers:

1. Bill of complaint.
2. Temporary restraining order.
3. Amended answer.
4. Order substituting Defendant Nugent.
5. Defendant Nugent's answer.
6. Motion to strike out.
7. Stipulation signed by counsel for Midvale Steel Company and for defendant.
8. Stipulation signed by counsel for other plaintiffs and for defendants.
9. Opinion on motion to strike out.
10. Final decree.

11. Memorandum adopting the opinion in the Maynard Coal case.
12. Assignments of error.
13. This notice.

JESSE C. ADKINS,
WILLIAM T. CHANTLAND,
Attorneys for Defendants.

127 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 124, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 37954 in equity, wherein Claire Furnace Company et al. are complainants and Federal Trade Commission et al. are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 24th day of March, 1922.

[SEAL.]

MORGAN H. BEACH,
Clerk,

By W. E. WILLIAMS,
Assistant Clerk.

115 Monday, May 22nd, A. D. 1922.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
 Huston Thompson, Nelson B. Gaskill, and John
 F. Nugent, members of and constituting the Fed-
 eral Trade Commission, appellants,
vs.
 CLAIRE FURNACE COMPANY, THE ELLA FURNACE COM-
 pany, Reliance Coke Company, et al.

No. 3798.

The argument in the above-entitled cause was commenced by Mr. Wm. H. Fuller, attorney for the appellants, and was continued by Messrs. A. Leo Weil and Wm. Wallace, jr., attorneys for the appellees, and was concluded by Mr. Wm. T. Chantland, attorney for the appellants.

116 FEDERAL TRADE COMMISSION AND VICTOR MUR-
 dock, Huston Thompson, Nelson B. Gaskill,
 and John F. Nugent, members of and constituting
 the Federal Trade Commission, appellants,
vs.
 CLAIRE FURNACE COMPANY, THE ELLA FURNACE COM-
 pany, Reliance Coke Company, et al.

No. 3798.

Opinion.

Mr. Justice Van Orsdel delivered the opinion of the court:

Appellee corporations filed a bill in the Supreme Court of the District of Columbia for an injunction to restrain appellant, Federal Trade Commission, from enforcing or attempting to enforce an order issued by the commission against the complainant companies requiring them to furnish monthly reports of the cost of production, balance sheets, and other information in detail, upon a large variety of subjects relative to the business in which complainant corporations are engaged.

The authority under which the commission assumes to act is expressed in a resolution, wherein it is stated that at a hearing held by a committee of the House of Representatives the commission was requested to suggest what might be done to reduce the high cost of living. In response the commission recommended to the committee "that it would be desirable to obtain and publish from time to time current information with respect to the 'production, ownership, manufacture, storage and distribution of foodstuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices,' and particularly with respect to various basic industries, including coal and steel."

An appropriation of \$150,000 was made available and the commission resolved to "proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit; and that such action be started as soon as possible with respect to the

coal industry and the steel industry, including in the latter closely related industries such as iron ore, coke, and pig-iron industries."

The alleged purpose of this report was to compile in combined or consolidated form the data received from individual companies, and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry, both for the benefit of the industry and of the public. At the same time, orders were issued to the complainant coal and coke companies requiring them to report the "monthly costs of production for the several products designated and other data as specified, in the form prescribed." Accordingly the commission issued to each of the complainant companies forms of reports, schedules, and questionnaires, calling for detailed information regarding the amount of products produced by the several complainants, respectively, the sales and contract prices thereof, and orders booked by them, the amounts allocated by them to depreciation, and administrative and selling expenses, and also to file with the commission quarterly income statements and balance sheets. In addition the commission required

complainants to submit their accounts and books for inspection
117 to enable it to check the reports which complainants were required to furnish from time to time. Complainants were warned that upon failure to comply with the orders of the commission the penalties prescribed by section 10 of the Trade Commission act would be imposed upon them.

Complainants allege, and it is not denied in the answer, that they "are engaged in producing, manufacturing, and making sales, in the states wherein their producing and manufacturing operations are conducted, and all of them are conducting mining operations or manufacturing plants, or both." The location of the manufacturing and mining plants is given and it appears that the companies are engaged in producing pig iron, tin plate, strip steel, billets, slabs, ingots, blooms, and other products of iron and steel finished and unfinished. It further appears that some of the companies are engaged in coal mining, manufacturing coke, and mining of ore. Defendant commission avers in its answer that with the exception of three companies named, "sixty-five per cent or more of the sales made by each of complainants is in interstate or foreign commerce, and that the greater portion of the principal raw materials of each concern is purchased and transported in interstate commerce to their converting plants."

The right of the commission to make the inquiry here involved is based upon the power of Congress to secure information concerning any subject matter in regard to which it has been given the power to legislate, and upon the further proposition that when one phase of a subject matter is within the jurisdiction of Congress it possesses the power to secure information as to the whole of the subject matter as a guide to further legislation. It is also urged, that power to obtain information is not limited to interstate commerce but includes intrastate commerce as well, when the two phases are a part of one subject; that the orders and report forms issued to complainants and others are for the purpose of inquiring into the whole of the steel industry of the United States, which industry, it is averred, includes both interstate and intrastate commerce. The commission then seeks to justify its proposed inquiry into complainants' business, both

interstate and intrastate, upon the hypothesis that the publication and dissemination of the information obtained will benefit the public and furnish a guide for future legislation.

Complainants having failed and refused to make the reports, the commission by written notice threatened the imposition of penalties for delay or failure to make due report as required. It is to restrain the commission from carrying the threats into effect that the present injunction is sought.

The commission answered the bill and complainants moved to strike out certain parts of the amended answer and to strike the entire amended answer from the files. The court ordered: "First. That the motion to strike out certain parts of the amended answer be overruled without prejudice to the right of the plaintiffs on any further hearings in said suit to raise objections to matters not properly pleaded. Second. That the second motion to strike the entire amended answer from the files be, and the same is hereby denied, except as to the ground that the said amended answer set forth no defense to the bill of complaint."

Defendants refusing to further plead or amend their answer, and expressing their willingness to stand upon their answer as a sufficient and complete defense, the court, treating the motion to strike as in the nature of a demurrer, entered a judgment making the temporary injunction final, from which decree this appeal was taken.

The extensive arguments set out in the answer, relative to the powers delegated by Congress to the commission; the power of Congress under the commerce clause of the Constitution; the authority of the commission to investigate the business affairs of a shipper in interstate commerce; the delegated power to inquire into the production of any commodity in nation-wide use, and the constitutional power of the commission to compel disclosure of the business methods employed by manufacturers and producers, are mere legal conclusions, not admitted by the motion to strike.

The statutory authority under which the commission in this instance presumes to act, is found in section 6, of the Federal Trade Commission act (38 Stat. 717), which provides: "That the commission shall also have power—(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. (b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such

reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

The act further authorizes the commission "to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."

The word "commerce" as used in the act, is defined as "commerce among the several States or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such territory and another, or between any such territory and
118 any state or foreign nation, or between the District of Columbia and any state or territory or foreign nation."

It will be observed that the inquiry instituted by the commission originated from a discussion of a committee of Congress relative to the high cost of living, and an appropriation by Congress of a lump sum to enable the commission to conduct such investigations as it might deem proper. There was no specific direction by Congress to make an investigation of the steel, iron or coal business. The commission on its own motion and by resolution instituted this investigation.

The commission is not proceeding upon any complaint filed before it, charging complainants with unfair competition or the violation of the Federal Trade Commission act or the antitrust acts. Neither is it the expressed intention of the commission to make an investigation relative to the operations of complainant companies in interstate commerce. The investigation seems to be more in the nature of a newsgathering expedition, in hope of securing something of public interest for publication, or possibly subject matter for future legislation by Congress. Common justice would seem to demand that before the business methods pursued by a corporation or an individual should be investigated, the party should be apprised either by a formal charge or by notice of the extent of the purposed investigation, in order that a day in court may be accorded. This is essential to determine whether the commission is acting within its jurisdiction and to meet the charges preferred.

This brings us to the point of determining whether in the present investigation the commission was acting within its jurisdiction. The authority of the commission, we think, is limited by the acts of Congress to investigating and reporting upon unfair methods of competition in interstate commerce, the enforcement of antitrust decrees and violations of the antitrust laws, and the making and publishing of reports thereon. The powers of the commission are limited to matters directly relevant to interstate commerce. In other words, the corporation under investigation must not only be engaged in interstate commerce, but the subject under investigation must be so related to interstate commerce that its regulation may be accomplished by act of Congress. Where the operations of a corporation, engaged in both interstate and intrastate commerce, are so interwoven and intermingled as to be inseparable, it may be conceded that in order to regulate interstate commerce, the intrastate

phases may be subjected to regulation and possible restriction, since the whole subject is thus brought within the jurisdiction of Congress.

But that is not this case. Here there is no intermingling in such manner as to render the interstate and intrastate features inseparable. Indeed, it is said of the iron and steel companies, in the brief of counsel for the commission, that "appellees bring their raw material from other States into those States where their plants are situated, and when the conversion or fabrication is complete approximately 65 per cent of the total of such converted products is sold and shipped into other States." Three separate and distinct operations are involved. First, the shipment of raw materials to the plants. If from outside of the State, the materials are in the nature of freight in interstate commerce from the time they are delivered to the carrier until they are delivered by the carrier at the plant. Second, the processes of manufacture by which the raw materials are converted into finished products, during which time the complainants are not engaged in commerce. Third, the sale and delivery of the finished product. If this is made outside of the State where the product has been manufactured, the product is in commerce as freight from the time of delivery to the carrier at the plant, until the carrier in turn delivers it to the consignee at destination. Indeed, the answer tacitly concedes the three operations by complainants—the assembling, the manufacture, and the sale of the manufactured article.

It, therefore, does not appear that complainants are common carriers or engaged in the operation of any of the instrumentalities of commerce. They are mere shippers, and as such are engaged in commerce only from the time their products, whether it be raw material or the finished product, are delivered to the carrier and in turn by the carrier delivered to them or to their consignees. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State." In *re Green*, 52 Fed. 113; quoted with approval in *Hammer v. Dagenhart*, 247 U. S. 251, 272.

Nothing is more clearly established by a long line of decision than that manufacture is not commerce. In *Kidd v. Pearson*, 128 U. S. 1, 20, the court said: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation."

It is equally well established that the mere act of production is not commerce. As the court said in *Hammer v. Dagenhart*, *supra*: "However much the *Knight Case*, 156 U. S. 1, may be weakened by later decisions, its distinction between production and commerce is still effective to prevent direct congressional regulation of production as distinguished from sale and transportation."

Where manufacture and production are a part of and essential to the operation of an instrumentality of interstate commerce, they may become so intimately associated with the instrumentality itself, that they may be treated as accessory thereto. In such a case inquiry into the conditions of manufacture and production may become necessary to insure intelligent regulation of the instrumentality.

119 A coal mine or railroad shop maintained by the same company, or by a subsidiary company to further the operation of a railroad or other instrumentality of interstate commerce, may be so closely associated with the operation of the road itself, that their operation may be conducted in such a manner as to obstruct or burden the freedom of interstate commerce, and, therefore, be within the regulatory power of Congress. But this condition has no application where the manufacture and production are independent of the operation of an instrumentality of commerce.

In the present case some of the complainants, either directly or through subsidiary companies, produce the coal, ore, and coke, used in manufacturing their iron and steel products, while other complainants purchase these materials for similar use. In these circumstances the mere production or purchase is not commerce, since the articles are not used in connection with an instrumentality of commerce, but are delivered to common carriers for transportation, thus creating the relation merely of shipper and carrier. The mining of the coal and ore and the production of the coke, precede and are independent of any act of commerce, just as manufacture is independent of commerce.

Except where the act of production or manufacture is directly related to the operation of an instrumentality of commerce and directly connected therewith, the regulatory power of Congress over the commerce in shipping raw materials to the manufacturing plant and the commerce in shipping the product from the plant, terminates with the assembling and begins again with the shipment of the manufactured product. It also follows that if Congress may not regulate manufacture and production directly, it may not regulate it indirectly through the medium of publicity. No facts are alleged from which it may be inferred that the interstate commerce in which complainants are engaged, in assembling raw materials and in shipping the finished product, is affected even remotely by either the production of the raw materials or their manufacture into the finished product. As was said in the *Dagenhart* case: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. * * * Over interstate transportation, or its incidence, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation."

It is not even claimed that the proposed investigation is for the purpose of aiding Congress in the exercise of the Federal police power, or for the purpose of effecting a possible disclosure of some vague ground upon which Congress might be induced to attempt its exercise by legislation. The dividing line between a strictly private enterprise and a "business impressed with a public interest" has not been clearly defined. A corporation devoted wholly to the service

of the public, and whose revenues are derived from fixed uniform charges for the various services rendered, as an insurance company, *German Alliance Insurance Co. v. Kansas*, 233 U. S. 389, or an elevator company, *Munn v. Illinois*, 94 U. S. 113, or a bank, *Noble State Bank vs. Haskell*, 219 U. S. 104, may well be so impressed with a public interest as to justify its regulation for the promotion of the public welfare. But this modern doctrine, so frequently invoked in justification of the assertion of the police power, has no application to the steel and iron business. There is no governmental power that can be invoked to compel the steel companies to serve the public, nor do they assume to render a public service.

The large percentage of their products go into the construction of the instrumentalities of transportation which are owned and employed by companies engaged in commerce, which, in their interstate aspect, are subject to Federal control; but that implies no authority in the government to regulate the production of a mere commodity entering into an agency, the management and control of which Congress has the delegated power to regulate. Complainant companies are engaged in a competitive productive industry, similar to the woolen or cotton manufacturers and those engaged in numerous other industries, where the business is regulated by competition and supply and demand, and the product enters into the general volume of commerce, subject to all the natural laws and conditions which generally govern and affect trade.

Citation is made in brief of counsel of instances where private corporations submitted to requests of the commission for so-called "war reports" and answered without objection. But the emergency caused by the war has passed and no test was made of the jurisdiction of the commission to proceed even in those cases. It is unnecessary, therefore, to consider the authority of the commission in a war emergency, since the question of jurisdiction was not raised and the circumstances which there obtained are not present here.

The cases relied upon by the commission relate chiefly to the power of Congress, either directly or through the commission, to regulate and inquire into the affairs of corporations engaged in the operation of instrumentalities of interstate commerce, or industries so closely allied as to form a part of the general business entering into such commerce, and capable of being so conducted as to impose a burden on interstate commerce. They arose upon charges, in some instances civil and in others criminal, based upon violations of the antitrust act, or unfair methods of competition in commerce, or violations of the Federal Trade Commission act, or of so conducting a business as to obstruct or burden interstate commerce. They are not pertinent, however, to this inquiry, since the manufacturing business of complainants is not commerce, and, therefore, not subject to regulation by Congress, or investigation by the commission.

Special reliance, however, is placed upon the recent decision of the Supreme Court of the United States in *Stafford et al. v. Wallace et al.*, and *Burton et al. v. Clyne*, — U. S. —, involving the validity of an act of Congress providing "for the supervision by federal authority of the business of the commission men and of the live-stock dealers in the great stockyards of the country."

In an action for injunction to restrain the enforcement of the act, the court held that the plan of operation of the stockyards companies was so closely allied with interstate commerce as to amount to a scheme for monopolization thereof. The court basing its opinion upon the decision in *Swift & Co. v. United States*, 196 U. S. 375, said: "It is manifest that Congress framed the packers and stockyards act in keeping with the principles announced and applied in the opinion in the *Swift* case. The recital in sec. 2, par. b of Title 1 of the act quoted in the margin leaves no doubt of this. The acts deals with the same current of business, and the same practical conception of interstate commerce."

While in some instances the great volume of live stock passing in commerce through the stockyards of the country is transformed into dressed meat, the court was careful to distinguish the processes employed from manufacture in general. As was said in the *Swift* case: "Therefore the case is not like *United States v. E. C. Knight Co.*, 156 U. S., 1, where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the state in the article manufactured was to follow from the agreement it was not a necessary consequence nor a primary end. Here the subject matter is sales and the very point of the combination is to restrain and monopolize commerce among the states in respect of such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct."

In *Hill, jr., et al., v. Wallace*, 257 U. S. 310, the court referring to the *Stafford* case "held it to be within the power of Congress to regulate business in the stockyards of the country, and include therein the regulation of commission men and of traders there, although they had to do only with sales completed and ended within the yards, because Congress had concluded that through exorbitant charges, dishonest practices and collusion they were likely, unless regulated, to impose a direct burden on the interstate commerce passing through." This again clearly distinguishes the *Stafford* case, since in the present case commerce does not pass through the plants where the processes of manufacture are conducted.

In these cases the court was dealing directly with the validity of statutes in which the purpose of Congress was clearly expressed. In the present case, however, there is no statute, and no object has been even intimated by Congress, nor are we enlightened by any definite statement from the commission of its purpose in making the investigation. The most that can be gathered from the answer is that a general survey of the coal, coke, steel and allied industries is contemplated, in a tentative search for information relative to the high cost of living. We are not impressed by the contention that the commission is invested with authority to inquire into and regulate any business of Nation-wide extent, or that the scope of its visitatorial powers are coextensive with the constitutional functions of Congress. As already suggested, we think the activities of the commission are strictly limited to the field of commerce, except so much thereof as has been occupied by the act to regulate commerce and by the Federal reserve act.

The decree is affirmed with costs.

Dissenting opinion by Chief Justice Smyth:

Being unable to concur in the opinion just announced, I state in a very general way the reasons for my dissent. For convenience I shall speak of the defendants as the commission.

This case does not call for a decision as to whether or not Congress or the Federal Trade Commission, acting by its authority, has the power to regulate manufacture or intrastate commerce. The order of the commission which is challenged does not seek to regulate anything. It simply calls for information relative to the activities of the plaintiffs in manufacture and commerce, both interstate and intrastate. It bases its claim to that part of the information which relates to manufacture and intrastate commerce upon the postulate that it is necessary to enable Congress and the commission to perform their respective duties with regard to commerce between the states, or at least that it is appropriate for that purpose.

The trial court sustained the plaintiff's motion to strike the commission's amended answer (hereafter called the answer), on the ground that it did not state a defense, and entered a decree for the plaintiffs. All its allegations, therefore, which are properly pleaded must be treated as admitted. Among other things, it alleges that plaintiffs are engaged in interstate commerce; that it is necessary that the commission procure complete information as to all the business of each of the plaintiffs in order that it shall perform its duty as to their interstate commerce; that unless the information is produced the commission will be unable to properly perform that duty, for the reason that all of the plaintiffs, while engaged substantially in interstate commerce, have also certain activities which are performed intrastate, and which activities are so interwoven with their interstate business that it is impossible to separate them, and that even if they could be separated the separation would render the result untrue and inaccurate and of little or no value in enabling the commission to perform its regulatory duties as to the interstate business of the plaintiffs. The answer also alleges that the information sought is necessary to enable Congress to perform its duties with respect to regulating the interstate and foreign commerce of the plaintiffs.

It is argued that the allegations of the answer to the effect that the information sought is necessary to enable Congress and the commission to perform their respective duties in regard to commerce between the States are mere conclusions of fact, and as such were not admitted by the motion; that the pleader should have set forth the facts from which it deduces the conclusion that the information is necessary. To this I can not accede. The purpose of the answer was to advise the plaintiffs as to what the commission expected to prove. This purpose was sufficiently served by stating the ultimate or operative facts. It was not required that the evidence upon which the commission relied to establish the facts should be set out.

121 If the plaintiffs desired a more specific statement, it was their right to move for it under equity rule 20, promulgated by the Supreme Court of the United States. This they did not do. A general statement of the essential ultimate facts upon which the defense rests is enough. "It was not necessary to aver * * * all the minute circumstances which may be proven in support of the general statement. * * *" The answer distinctly apprised the plain-

tiffs of the precise case they were required to meet *St. Louis v. Knapp Co.*, 104 U. S. 658, 661. As was said by Mr. Justice Holmes, delivering the opinion of the court in *Swift and Company v. United States*, 196 U. S. 375, 395, "a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what is fairly conveyed to a dispassionate reader by a fairly exact use of the English speech." See also *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 136. It is my opinion that the answer sufficiently alleged that the information sought was necessary or at least appropriate for the purposes indicated, and that the motion to strike admitted it.

Plaintiffs allege in variant forms that the commission is not authorized by the act creating it to demand the information sought. Section 6 of the act is set out in the opinion of the court. It authorizes the commission to "gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices, and management of any corporation engaged in commerce"; to require, "by general or special orders, corporations engaged in commerce * * * to file with the commission in such form as the commission may prescribe, annual or special, or both annual and special, reports or answers in writing, to specific question, furnishing to the commission such information as it may require as to the organization, business, conduct, (and) practices" of the corporations mentioned. And it is declared to be the duty of the commission to "make public from time to time such portion of the information obtained by it * * * except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation," etc. The commerce spoken of is interstate.

In the answer it is alleged, and not denied, that all the plaintiffs are engaged in interstate commerce and that sixty-five per cent of their business, save as to three, is such commerce. They belong, therefore, to the class of corporations "concerning" which the act authorizes the commission to gather information. Does the information requested come within the purview of the act? It relates to the "business, conduct, practices, and management" of the corporate plaintiffs. It is called for in the form of special reports, and is sought for the purpose of making it public and of laying it before Congress with recommendations for additional legislation.

It is urged that, while the information relates to the business, etc., of the plaintiffs, this is not enough—that it must concern the interstate commerce features of that business. The answer, as we have shown, alleges, and the allegation is admitted, that the information is necessary in order that the commission and Congress may perform their duties with respect to the interstate features of the business. Since this is true, it must concern those features, and therefore it is such as the commission is authorized to gather.

The next inquiry is as to whether Congress had the power to confer upon the commission authority to gather information with respect to the manufacturing and intrastate activities of corporations engaged in commerce between the States, to the end that it might regulate, either by legislation or otherwise, the commerce over which

it has jurisdiction. The requiring of information concerning a business is not a regulation of that business. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 211. In that case reports were called for by the commission with respect to intrastate business. The corporation refused to supply it, on the ground that the commission had no power to demand such information, because it related to intrastate business. But the court said that, since the information was essential to enable the commission to perform its required duties touching interstate commerce, the commission had a right to require it. There are other decisions to the effect that Congress may enter the domain of intrastate activities whenever it is appropriate that it should do so in order that it may properly exercise its regulatory power with respect to interstate commerce. *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Company*, 167 U. S. 479, 506; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 21; *The Minnesota Rate Cases*, 230 U. S. 352, 431.

One of the briefs for the plaintiffs admits that as soon as any concrete legislation should be submitted to or contemplated by Congress, "it would have full power to secure any and all information indispensable to a proper consideration and disposition of such proposed legislation." I think this concession is sound, but it is too restricted. May it not be essential that Congress should have information on a given phase of commerce before it formulates any concrete legislation or contemplates legislation with reference to it? And if so, why should it not have the same right to gather it as it would have, according to the concession, where legislation is actually pending? To say that it may authorize the procuring of all the facts necessary to the proper disposition of pending legislation but that it has no power to gather what may be appropriate to enable it to determine whether any legislation is necessary does not appeal to me as sound.

But it is argued that the regulatory power of Congress must be exercised through legislation, and that information desired for the mere purpose of publication may not be required by it. There is nothing in the Constitution which says how Congress shall exercise its regulatory power. This is left to its judgment. Former Senator Burton of Ohio in his work on *Corporations and the State*, 60, 61, after a very careful consideration of the matter, declared that "of all regulations which promise results publicity should be placed first."

122 It is beyond dispute that Congress has no general visitatorial powers over State corporations, but it has been decided that it has power to visit them for the purpose of seeing "that its own laws are respected." *Wilson v. United States*, 221 U. S. 361, 384. By a parity of reasoning may it not be said that if it is necessary to protect interstate commerce, or appropriate for that purpose, that Congress should enter the field of intrastate commerce, it may do so? *Houston & Texas Railway v. United States*, 234 U. S. 342. In that case the court said that Congress possesses "the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." Page 353.

The power of Congress to require the production of the information in question is defended by the commission upon several grounds in addition to those I have mentioned, but I do not think it necessary for me to go further into the subject.

I am satisfied that the law requires that the information demanded be supplied, and therefore I think the decree of the lower court should be reversed and the bill dismissed.

123

Tuesday, January 2nd, A. D. 1923.

* * * * *

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK, Huston Thompson, Nelson B. Gaskill and John F. Nugent, members of and constituting the Federal Trade Commission, appellants.

No. 3798. January Term, 1923.

vs.

CLAIRE FURNACE COMPANY, THE ELLA FURNACE Company, Reliance Coke Company, et al.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice VAN ORSDIEL,
January 2, 1923.

Mr. Chief Justice Smyth dissenting.

124 In the Court of Appeals of the District of Columbia.

January Term, 1923.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK, Huston Thompson, Nelson B. Gaskill, and John F. Nugent, members of and constituting the Federal Trade Commission, appellants.

vs.

CLAIRE FURNACE CO., THE ELLA FURNACE CO., RELIANCE Coke Co., Westmoreland-Connellsville Coal & Coke Co., Weirton Steel Co., Edgewater Steel Co., LaBelle Iron Works, Donner Steel Co., Steel & Tube Co. of America, Midvale Steel & Ordnance Co., Cambria Steel Co., Republic Iron & Steel Co., McKeesport Tin Plate Co., N. & G. Taylor Co., Inland Steel Co., Trumbull Steel Co., Bethlehem Steel Co., The Youngstown Sheet & Tube Co., The Brier Hill Steel Co., West Penn Steel Co., Wheeling Steel & Iron Co., and Sharon Hoop Co., appellees,

No. 3798.

Petition for allowance of appeal.

Come now the appellants, Federal Trade Commission and Victor Murdock, Huston Thompson, Nelson B. Gaskill, and John F. Nugent, members of and constituting the Federal Trade Commission, in the above-entitled cause and show that on or about the 3rd day of January, 1923, this court entered a judgment herein in favor of appellees and against these appellants, affirming the decree of the Supreme Court of the District of Columbia in favor of appellees, in which judgment of the Court of Appeals certain errors were committed to the prejudice of appellants, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellants further show that the said judgment of this court is subject to review by the Supreme Court of the United States under the provisions of the third paragraph of section 250 of the Judicial Code in that the construction and application of the Constitution of the United States and the constitutionality of a law of the United States is drawn in question.

They further show that said judgment is subject to review by the Supreme Court of the United States under the fifth paragraph of section 250 of the Judicial Code in that the validity of an authority exercised under the United States, and the existence and scope of a power or duty of the appellants, said appellants being officers of the United States, are drawn in question.

They further show that said judgment is subject to review by the Supreme Court of the United States under the provisions of the sixth paragraph of said section 250 of the Judicial Code, in that the proper construction of an act of Congress, under which appellants purport to act, is drawn in question by appellees who were plaintiffs below.

WHEREFORE, they pray the allowance of an appeal removing this cause to the Supreme Court of the United States for the correction of the errors complained of; that appellants be permitted to deposit with the clerk of this court, \$100 cash, in lieu of the usual bond upon appeal; that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be prepared by the clerk of this court.

THE FEDERAL TRADE COMMISSION,
VICTOR MURDOCK, HUSTON THOMPSON, NELSON B.
GASKILL, and JOHN F. NUGENT, *Appellants*,
By W. H. FULLER,
Chief Counsel, Federal Trade Commission.
ADRIEU F. BUSICK,
Attorney for Appellants.

Service of the within paper admitted and receipt of copy acknowledged this 16 day of March, 1923.

COOKE & BENEMAN,
Attorneys for Appellees.

128 FEDERAL TRADE COMMISSION VS. CLAIRE FURNACE CO. ET AL.

127 (Indorsement:) In the Court of Appeals of the District of Columbia. The Federal Trade Commission et al., appellants, vs. Claire Furnace Co. et al., appellees. Petition for allowance of appeal. Court of Appeals, District of Columbia. Filed Mar. 16, 1923. Henry W. Hodges, clerk.

128 Saturday, March 17th, A. D. 1923.

* * * * *

FEDERAL TRADE COMMISSION ET AL., APPELLANT,	} No. 3798.
vs.	
CLAIRE FURNACE COMPANY ET AL.	

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above-entitled cause, it is ordered that said appeal be and the same is hereby allowed, with leave to appellants to make a cash deposit of one hundred dollars with the clerk of this court in lieu of bond.

129 MEMORANDUM:

March 17, 1923. One hundred dollars deposited with the clerk of the Court of Appeals, D. C., in lieu of bond.

130 UNITED STATES OF AMERICA, SS:

TO CLAIRE FURNACE COMPANY, THE ELLA FURNACE COMPANY, RELIANCE COKE COMPANY, et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Federal Trade Commission and Victor Murdock, Huston Thompson, Nelson B. Gaskell, and John F. Nugent, members of and constituting the Federal Trade Commission, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty-three.

CONSTANTINE J. SMYTH,
*Chief Justice of the Court of Appeals
of the District of Columbia.*

Service acknowledged this 17th day of March, 1923.

COOKE & BENEMAN.

(Indorsement:) Court of Appeals, District of Columbia. Filed Mar. 17, 1923. Henry W. Hodges, clerk.

132 In the Court of Appeals of the District of Columbia.

January Term, 1923.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
Huston Thompson, Nelson B. Gaskill, and John
F. Nugent, members of and constituting the Fed-
eral Trade Commission, appellants,

vs.

CLAIRE FURNACE CO., THE ELLA FURNACE CO., Re-
liance Coke Co., Westmoreland-Connellsville
Coal & Coke Co., Weirton Steel Co., Edgewater
Steel Co., LaBelle Iron Works, Donner Steel Co., No. 3798.
Steel & Tube Co. of America, Midvale Steel &
Ordnance Co., Cambria Steel Co., Republic Iron
& Steel Co., McKeesport Tin Plate Co., N. & G.
Taylor Co., Inland Steel Co., Trumbull Steel
Co., Bethlehem Steel Co., The Youngstown
Sheet & Tube Co., The Brier Hill Steel Co.,
West Penn Steel Co., Wheeling Steel & Iron Co.,
and Sharon Steel Hoop Co., appellees.

Assignment of errors.

Now come the appellants, by their attorneys, and say that in the record and proceeding in the Court of Appeals in the District of Columbia in the above-entitled cause and in the rendition of final judgment therein manifest error has intervened to the prejudice of appellants in this, to wit:

I.

That the court erred in affirming the decree of the Supreme Court of the District of Columbia, and in holding that the temporary injunction should be made final.

II.

That the court erred in holding that the amended answer did not state a defense to the bill of complaint.

133

III.

That the court erred in not holding that Congress has power under the Constitution to require corporations engaged in interstate commerce to supply any information concerning their interstate commerce which may enable it intelligently and effectively to legislate respecting such commerce.

IV.

That the court erred in holding in effect that Congress can not create an agency for the purpose of securing information which may enable it intelligently and effectively to legislate on any subject within the jurisdiction committed to it by the Federal Constitution,

and can not constitutionally authorize an administrative agency to procure such information for it; and has not, by section 6 of the Federal Trade Commission act, constitutionally authorized the Federal Trade Commission to procure information for the use of Congress respecting the interstate commerce of corporations engaged in business.

V.

That the court erred in holding in effect that Congress has not power under the Constitution to require corporations engaged in interstate commerce to furnish it with such information respecting their intrastate commerce and manufacturing operations as may enable it intelligently and effectively to legislate respecting interstate commerce.

VI.

That the court erred in holding in effect that the power of Congress to authorize the gathering and compiling of information and/or to authorize the requirement of reports from corporations engaged in interstate commerce as to their organization, business, conduct, practices, management, and relation to corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing, does not extend to all matters directly or indirectly affecting the levying and collecting of taxes, borrowing of money, fixing of standards for weights and measures, promoting the useful arts by granting patents of monopoly for limited terms, raising and supporting armies, providing and maintaining a navy, and to all matters touching the promotion of the general welfare and making provision for the common defense, and the making of any laws necessary and proper to the exercise of these or any other legislative powers conferred by the Constitution upon Congress; and that section 6 of the Federal Trade Commission act is not a constitutional exercise of these powers.

134

VII.

That the court erred in holding in effect that Congress can not constitutionally authorize, and has not by section 6 of the Federal Trade Commission act so authorized, the Federal Trade Commission to require from corporations engaged in interstate commerce information respecting their interstate commerce; and to publish and to transmit the same to Congress, which may enable Congress intelligently and effectively to legislate respecting interstate commerce.

VIII.

That the court erred in not holding that Congress may constitutionally authorize, and has by section 6 of the Federal Trade Commission act so authorized, the Federal Trade Commission to require from corporations engaged in interstate commerce information respecting their intrastate commerce and manufacturing operations, and to publish and to transmit the same to Congress, which may enable Congress intelligently and effectively to legislate respecting interstate commerce.

IX.

That the court erred in not holding that the appellee companies are in business primarily for the purpose of selling and shipping their products in interstate commerce, and that the business of each is a unit, and is so interwoven that it is impracticable and/or impossible to segregate the required information as to the interstate operations of the appellees' business from that which is intrastate, and that it is therefore necessary for appellants, in order properly to perform the duties constitutionally imposed upon it as the agency of Congress, to have complete information as to the total business and trade of each of the appellee companies, and that if any regulation of matters purely intrastate seems to result, it is incidental and a moral rather than a compulsory effect.

X.

That the court erred in holding that the Federal Trade Commission is not authorized, by section 6 of the Federal Trade Commission act, to investigate the matters concerning which information was asked in the questionnaires sent to the appellee companies, and in the course of such investigation to ascertain all of the facts called for in the questionnaires.

XI.

That the court erred in holding that the authority conferred by section 6 of the Federal Trade Commission act does not empower the Federal Trade Commission to require by special reports the information called for by the questionnaires sent to the appellee companies.

135

XII.

That the court erred in holding that the information required in the questionnaires sent to the appellee companies respecting the prices received for iron and steel products sold in interstate commerce is not information respecting interstate commerce itself and such as the Federal Trade Commission may demand under the authority of the Federal Trade Commission act.

XIII.

That the court erred in holding that the information required respecting the cost to the appellee companies of producing iron and steel products sold by them in interstate commerce is not information respecting interstate commerce itself and not such as the Federal Trade Commission may demand under authority of the Federal Trade Commission act.

XIV.

That the court erred in holding that the information respecting the quantities of iron and steel products produced by the appellee companies, their capacity to produce such products, the quantities

sold, and the orders booked, was not necessary to a proper understanding of market conditions in interstate commerce of these products and therefore such as the Federal Trade Commission may demand under authority of the Federal Trade Commission act.

XV.

That the court erred in holding that the income statements and general balance sheets did not contain such information as the Federal Trade Commission could under authority of the statute require of the corporations engaged in interstate commerce, and such as Congress could constitutionally empower the Federal Trade Commission to require.

XVI.

That the court erred in not holding that the interstate and intrastate commerce, as well as the manufacturing operations of the appellee corporations, were so intermingled that appellee corporations could not furnish the information required in the Federal Trade Commission's questionnaires for their interstate commerce but must necessarily furnish it as applied to their entire business.

XVII.

That the court erred in holding that the appellee companies are engaged in interstate commerce only from the time raw materials purchased by them in States other than those in which their plants are located are delivered to the carrier for shipment to their plants and from the time products manufactured by the appellee
136 companies are delivered by the common carrier to the companies' consignees, in States other than those in which their plants are located.

XVIII.

That the court erred in holding that the purchase by appellee companies of raw material in States other than those in which their plants are located for shipment to their plants is not interstate commerce.

XIX.

That the court erred in holding that the interstate commerce of the appellee companies is confined to the transportation of products produced by them from one State to another, and does not include all negotiations and contracts for the sale of products produced by them in States other than the State produced, and the negotiations and contracts of purchase and the purchases by appellee companies of raw materials in States other than those in which their plants are located for shipment to such plants.

XX.

That the court erred in holding that inquiry into the conditions of manufacture and production may be had to insure intelligent regula-

tion by Congress of an instrumentality of interstate commerce but may not be had to insure intelligent regulation of commerce itself—i. e., the purchase and sale of commodities between persons in different States.

XXI.

That the court erred in holding, in effect, that the power to regulate interstate commerce is limited to the regulation of the business of common carriers.

XXII.

That the court erred in holding that no facts were alleged showing that the sale in interstate commerce by appellee companies of finished products manufactured by them is or may be affected by the manufacturing operations of the appellee companies.

XXIII.

That the court erred in holding that the sale by appellee companies of finished products in interstate commerce is not affected or may not be affected by the manufacturing operations of the appellee companies.

XXIV.

That the court erred in not holding that the appellee companies' business of manufacturing may be so conducted as to impose a burden on or to restrain interstate commerce.

137

XXV.

That the court erred in holding that the Federal Trade Commission by resolving that the purpose of the investigation was to publish the information received, was without power under section 6 of the Federal Trade Commission act, and did not intend also to transmit said information to Congress, and was not acting as the agent of Congress for the purpose of securing information upon which Congress might act directly and which being brought to the notice of the public, might tend to accomplish the same purpose through moral effect.

XXVI.

That the court erred in holding in effect that the information required by the Federal Trade Commission is not such information as will enable Congress and the Federal Trade Commission, as the agent of Congress, to perform their respective duties in regard to interstate commerce in iron and steel products.

XXVII.

That the court erred in holding that it was not the expressed intention of the Federal Trade Commission to make an investigation relative to the operation of the appellee companies in interstate commerce.

XXVIII.

That the court erred in holding that the appellee companies were not advised of the extent of the investigation purposed by the Federal Trade Commission.

XXIX.

That the court erred in holding that the authority of the Federal Trade Commission under the Federal Trade Commission act is limited to investigating and reporting upon violations of section 5 of the Federal Trade Commission act, the enforcement of antitrust decrees, and violation of antitrust laws, and does not extend to making investigations respecting the conduct, organization, management, business and practices of corporations engaged in interstate commerce, and reporting the facts secured in such investigations to Congress and publishing such parts thereof as to the Federal Trade Commission may appear to be in the public interest.

XXX.

That the court erred in holding that the business of selling basic steel products in interstate commerce is not one affected with a public interest, concerning which Congress, through the instrumentality of the Federal Trade Commission, may demand full and complete information.

138

XXXI.

That the court erred in holding that requiring information respecting the conduct, organization, business, management and practices of corporations engaged in interstate commerce for publication and transmission to Congress is a regulation of the business or commerce of such corporations, even though it may result in changes therein by moral effect.

WHEREFORE, the appellants pray that, for the errors aforesaid and other errors appearing in the record of said Court of Appeals, the said judgment of said Court of Appeals be reversed and for naught esteemed and that said cause be remanded to the said Court of Appeals with instructions to reverse the decree of the Supreme Court of the District of Columbia in said suit rendered or for such further proceedings in said suit as may be determined by the Supreme Court of the United States, to the end that justice may be done in the premises.

FEDERAL TRADE COMMISSION et al.,

Appellants.

By W. H. FULLER, *Chief Counsel*,
and ADRIEN F. BUSICK,

Attorneys for Appellants.

Service of a copy of the within paper admitted this 16th day of March, 1923.

COOKE & BENEMAN,
Attorneys for Appellees.

(Indorsement:) In the Court of Appeals of the District of Columbia. The Federal Trade Commission et al., appellants, vs. Claire Furnace Co. et al., appellees. Assignment of errors. Court of Appeals, District of Columbia. Filed Mar. 17, 1923. Henry W. Hodges, clerk. No. 3798.

140 In the Court of Appeals of the District of Columbia.

January Term, 1923.

FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
Huston Thompson, Nelson B. Gaskill, and John
F. Nugent, members of and constituting the Fed-
eral Trade Commission, appellants,

vs.

CLAIRE FURNACE CO., THE ELLA FURNACE CO., RE-
liance Coke Co., Westmoreland-Connellsville
Coal & Coke Co., Weirton Steel Co., Edgewater
Steel Co., LaBelle Iron Works, Donner Steel
Co., Steel & Tube Co. of America, Midvale Steel
& Ordnance Co., Cambria Steel Co., Republic
Iron & Steel Co., McKeesport Tin Plate Co., N. &
G. Taylor Co., Inland Steel Co., Trumbull Steel
Co., Bethlehem Steel Co., The Youngstown Sheet
& Tube Co., The Brier Hill Steel Co., West Penn
Steel Co., Wheeling Steel & Iron Co., and Sharon
Steel Hoop Co., appellees. No. 3798.

Designation of record.

The clerk will please prepare the transcript of record on appeal herein, and will include therein the following papers:

1. The record in the Supreme Court of the District of Columbia, as printed in this court.
2. Memorandum showing argument was had, etc.
3. Opinion of this court and dissenting opinion.
4. Decree.
- 141 5. Petition for allowance of appeal.
6. Order granting appeal.
- 6½. Memoranda as to deposit of \$100 cash in lieu of bond.
7. Citation.
8. Acceptance of service.
9. Assignment of errors.
10. This designation.
11. Certificate.

W. H. FULLER,
ADRIEN F. BUSICK,
Attorneys for Appellants.

Service of the within papers, and receipt of a copy thereof, admitted this 19 day of March, 1923.

LEW COOKE,
COOKE & BENEMAN,
Attorneys for Appellees.

142 [Indorsement:] In the Court of Appeals of the District of Columbia. January Term, 1923. Federal Trade Commission et al., appellants, vs. Claire Furnace Co. et al., appellees. No. 3798, Designation of record. Court of Appeals, District of Columbia, Filed Mar. 20, 1923. Henry W. Hodges, clerk.

143 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages numbered from 1 to 142, inclusive, constitute a true copy of the transcript of record and proceedings of said court, as designated by counsel, in the case of Federal Trade Commission and Victor Murdock, Huston Thompson, Nelson B. Gaskill, and John F. Nugent, members of and constituting the Federal Trade Commission, appellants, vs. Claire Furnace Company, The Ella Furnace Company, Reliance Coke Company, et al., No. 3798, January term, 1923, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twentieth day of March, A. D. 1923.

[SEAL.]

HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*



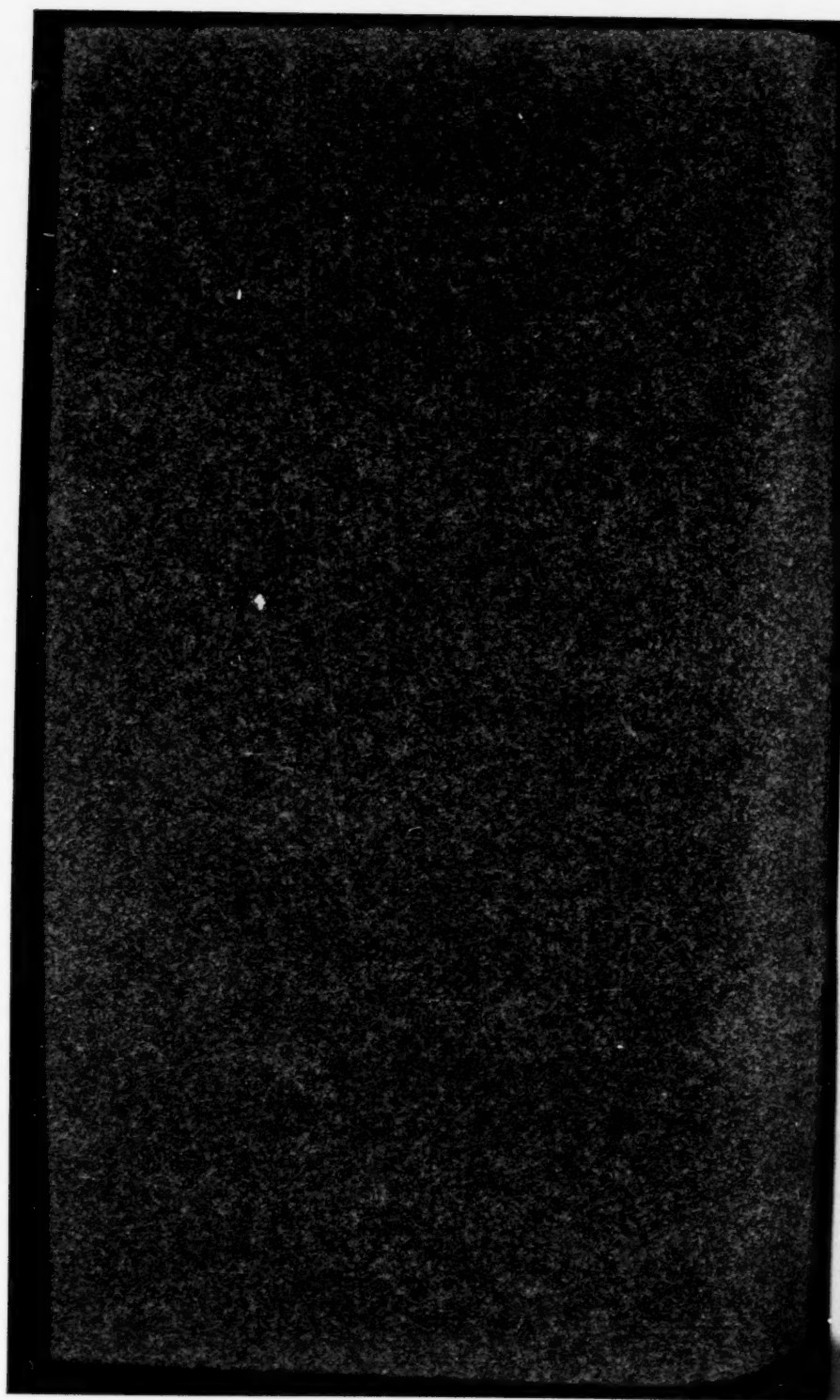


TABLE OF CONTENTS.

Statement.....	Page.
The facts.....	1
Origin of the Commission's inquiry.....	4
Holding of the courts below.....	7
The questions presented.....	9
History of the times in which Congress created the Trade Commission.....	10
Previous legislation.....	11
Provisions of the Trade Commission Act directly involved in this suit.....	13
Argument.....	14
	17

I.

Congress has power to compel the giving of information and production of documents in any inquiry concerning a subject matter over which it has jurisdiction to legislate.....	17
1. The Constitution conferred all powers proper for the exercise of each power expressly granted.....	18
2. Among powers so granted is that to acquire information..	21
3. It is not necessary to establish in each instance that the information required is indispensable to legislative action.....	31
4. The specific character of the action contemplated by Congress need not be shown in order that information may be required.....	33
5. Information respecting prices may be required, though no power to fix reasonable prices exists.....	34
6. Information required should be had at least as to articles of prime necessity.....	35

II.

Congress can constitutionally authorize an administrative body to collect information respecting any subject over which it has legislative jurisdiction.....	37
--	----

III.

Jurisdiction of Congress over interstate commerce and extent of the power to require information.....	44
1. Commerce among the States includes the purchase and sale of commodities between citizens in different States.....	44
2. Power to regulate extends to all matters which may burden or restrain interstate commerce, even though not actually a part thereof.....	46
3. Power of Congress to require information respecting interstate commerce is broader than the power to regulate, and extends to ascertaining what, if any, burdens or restraints upon such commerce are threatened.....	48

II

Argument—Continued.

IV.

	Page.
The information called for by the questionnaires concerns interstate commerce itself, or matters so closely related thereto as to be necessary to an intelligent report upon conditions existing in such commerce, and may be lawfully required.....	52
1. The information is necessary to show whether the law of supply and demand operates.....	52
2. Each item required relates to subject matter upon which Congress may legislate.....	55
a. Prices.....	55
b. Cost of commodities sold in interstate commerce..	56
c. Statistics of production and productive capacity..	57
d. Orders booked during month and unfilled orders outstanding at end of month.....	59
e. Balance sheets.....	60
3. Impossibility of segregating required data as between interstate and intrastate commerce.....	61

V.

Congress has power to provide for the investigation of corporations and the compulsory making of reports by them, and for the publication of the facts for the purpose of applying the corrective force of public opinion to the practices of corporations.	65
---	----

VI.

Congress has power to compel the giving of information and production of documents to show whether the laws which the commission is charged with enforcing are being violated, and demand therefor falls within the visitatorial power of Congress over corporations engaged in interstate commerce.....	71
--	----

VII.

The Trade Commission Act authorizes the commission to require the information and reports specified in the questionnaires..	73
1. The Commission's action was within the text of the law..	73
2. The Commission's action was in harmony with the long interpretation of this and other acts by the Government.....	74
3. The Commission's action was in harmony with the Congressional interpretation of the Trade Commission Act.	77
4. The call for monthly reports was lawful.....	79

VIII.

The demand for the information contained in the questionnaires in the manner and form made does not violate the fourth or the fifth amendment to the Federal Constitution.....	81
The fifth amendment.....	81
The fourth amendment.....	83
Appendix "A". Report of Mr. Covington from House Committee on Interstate and Foreign Commerce (with minority report).....	88

AUTHORITIES CITED.

	Page.
A. L. R. (V. 9, P. 1341).....	30
American Column & Lumber Co. v. United States (257 U. S. 377).....	57
Anheuser-Busch Brewing Assn. v. Houck, 27 S. W. 692; affirmed 30 S. W. 869.....	35
Arnolt v. Coal Co., 68 N. Y. 558.....	35
Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission (221 U. S. 612).....	86
Board of Trade v. Olsen (262 U. S. 1).....	30
Boyd v. United States (106 U. S. 633).....	83
Brown v. Maryland (12 Wheat. 419).....	45
Burnham v. Morrissey (14 Gray, 226).....	30
Burton v. United States (202 U. S. 367).....	38
Buttfield v. Stranahan (192 U. S. 470).....	41
Central Shade Roller Co. v. Cushman (103 Mass. 353, 9 N. E. 629)...	35
Chapman, In re (106 U. S. 661).....	27, 33, 40
Consolidated Rendering Co. v. Vermont (207 U. S. 541).....	85
Crenshaw v. Ark. (227 U. S. 389).....	45
Dahke-Walker Milling Co. v. Bondurant (257 U. S. 282).....	45
Davis v. Virginia (236 U. S. 697).....	45
Dozier v. Ala. (218 U. S. 124).....	45
Dutton v. Knoxville (121 Tenn. 26; 113 S. W. 381).....	35
Eduards v. Darby (12 Wheat. 206).....	75
Essee Co. v. United States (262 U. S. 151).....	84, 85
Fairbank v. United States (181 U. S. 283, 310).....	76
Federal Trade Commission v. Beech-Nut Packing Co. (257 U. S. 441)...	72
Field v. Clark (143 U. S. 649).....	41
First National Bank v. Union Trust Co. (244 U. S. 416, 424).....	43
Flint v. Stone Tracy Co. (220 U. S. 107, 175-176).....	68, 74
Gibbons v. Ogden (9 Wheat. 1, 188).....	45, 46
Gloucester Ising Glass Co. v. Russia Cement Co. (154 Mass. 92, 27 N. E. 105).....	35
Hale v. Henkel (201 U. S. 43).....	72, 85
Hamilton v. Kentucky Distilleries Co. (251 U. S. 146, 161).....	32
Hammond Packing Co. v. Ark. (212 U. S. 322).....	85
Harriman v. Interstate Commerce Commission (211 U. S. 407).....	25
Houston & Texas Ry. Co. v. United States (234 U. S. 342).....	46, 78
Interstate Commerce Commission v. Brimson (154 U. S. 447, 476).....	21, 33
Interstate Commerce Commission v. Goodrich Transit Co. (224 U. S. 194).....	40, 42, 49, 50, 72
Komada v. United States (215 U. S. 392, 396).....	67, 77
Legal Tender Cases (110 U. S. 421, 440; 12 Wall. 457, 536).....	19, 43
Loewe v. Lawlor (208 U. S. 274).....	47

IV

	Page.
<i>McCulloch v. Maryland</i> (4 Wheat. 315).....	19, 43
<i>McDonald v. Keeler</i> (99 N. Y. 463).....	27
<i>Minnesota Rate Cases</i> (230 U. S. 352).....	65
<i>Morris Run Coal Co. v. Barclay</i> (68 Penn St. 176).....	35
<i>Murray v. Hoboken Land Co.</i> (18 Howard, 274, 285).....	83
<i>Pacific Factor Co. v. Adler</i> (27 Pac. 36).....	35
<i>Pa. R. R. Co. v. U. S. Railroad Labor Board et al.</i> (decided Feb. 19, 1923).....	68
<i>Pennoyer v. McConaughy</i> (140 U. S. 1, 23).....	76
<i>People ex rel. Bender v. Milliken</i> (185 N. Y. 35; 77 N. E. 872).....	29, 41
<i>People v. Sharp</i> (107 N. Y. 427; 14 N. E. 319).....	29
<i>Pensacola Telegraph Co. v. Western Union Telegraph Co.</i> (96 U. S. 1).....	46
<i>Railroad Commission of Wisconsin et al. v. Chicago, Burlington & Quincy Railroad</i> (257 U. S. 563).....	46, 65
<i>Raymond v. Leavitt</i> (46 Mich. 447).....	35
<i>Rearick v. Penna.</i> (203 U. S. 507).....	45
<i>Richardson v. Buhl</i> (77 Mich. 632; 43 N. W. 1102).....	35
<i>Robbins v. Shelby County Taxing District</i> (120 U. S. 489).....	45
<i>Robertson v. Downing</i> (127 U. S. 607, 613).....	75, 77
<i>Selective Draft Law Cases</i> (245 U. S. 366, 377).....	31
<i>Sheppard v. Bryant</i> (191 Mass. 591; 78 N. E. 394).....	29
<i>Shreveport Rate Case</i> (234 U. S. 342).....	46, 78
<i>Smith v. Interstate Commerce Commission</i> (245 U. S. 33, 42)....	22, 33, 40, 42
<i>Stafford v. Wallace</i> (258 U. S. 495).....	30, 45, 47, 51
<i>Standard Oil Co. v. U. S.</i> (221 U. S. 1, 52).....	48, 56
<i>Stewart v. Michigan</i> (232 U. S. 665).....	45
<i>Swift & Co. v. U. S.</i> (196 U. S. 375).....	45
<i>Telegraph Co. v. Texas</i> (105 U. S. 460).....	46
<i>Union Bridge Co. v. U. S.</i> (204 U. S. 364).....	42
<i>United Shoe Machinery Co. v. La Chapelle</i> , (212 Mass. 467, 480).....	35
<i>United States v. American Tobacco Co.</i> (221 U. S. 106).....	48
<i>United States v. Falk</i> (204 U. S. 143, 152).....	76, 77
<i>United States v. Ferger</i> (250 U. S. 199).....	47
<i>United States v. Fisher</i> (2 Cranch 358, 396).....	43
<i>United States v. Grimaud</i> (220 U. S. 506).....	42
<i>United States v. Hermanos</i> (209 U. S. 337, 339).....	77
<i>United States v. International Harvester Co.</i> (214 Fed. 987).....	48
<i>United States v. Moore</i> (95 U. S. 760, 763).....	75
<i>United States v. Patten</i> (226 U. S. 525).....	47
<i>United States v. Philbrick</i> (120 U. S. 52).....	76
<i>United States v. Reading Co.</i> (226 U. S. 324, S. C. 253 U. S. 27).....	48
<i>United States v. State Bank of N. C.</i> (6 Pet. 29, 39).....	75
<i>Watson on the Constitution</i> (p. 114).....	38
<i>Wayman v. Southard</i> (10 Wheat. 1, 42, 43).....	39
<i>Wheeler v. U. S.</i> (226 U. S. 478).....	81, 84
<i>Wilson v. U. S.</i> (221 U. S. 361).....	81, 84
<i>Wilson</i> (President's message to Congress), January 20, 1914.....	12

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED.

United States Constitution:	Page.
Article I, section 1	18
Article I, section 8	18
Fourth Amendment	67, 83
Fifth Amendment	81
Deficiency Appropriation Act, fiscal year 1920	8
Bureau of Corporations Act (32 Stat. 825)	13, 66
Federal Trade Commission Act (Chap. 311, 38 Stat. 717):	
Section 5	70, 83, 85
Section 6	14, 15, 41, 65, 69, 73, 80
Section 9	16
Section 10	16
Act to Regulate Commerce, section 12 (24 Stat. at L., 379)	41, 78
Packers' and Stockyards' Act of 1921 (42 Stat. 159)	43
Grain Futures Act (42 Stat. 998)	43
Sherman Antitrust Act (26 Stat. 209)	56, 57
Tariff Act of 1909 (36 Stat., c. 6, pp. 11, 112-117)	67
Transportation Act of 1920 (C. 91, 41 Stat. 456, 469)	67, 68
Corporations Tax Act	67
Clayton Act (38 Stat. 730)	72

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

FEDERAL TRADE COMMISSION ET AL., AP- pellants, v. CLAIRE FURNACE COMPANY ET AL., AP- pellees.	} No. 250.
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*ON APPEAL FROM THE COURT OF APPEALS OF THE
DISTRICT OF COLUMBIA.*

BRIEF FOR APPELLANTS.

STATEMENT.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District of Columbia enjoining the Federal Trade Commission and the members thereof (hereinafter called "the Commission") from requiring the appellees to furnish to the Commission certain reports giving in detail the quantities of finished and semifinished steel

THE FACTS.

In January and February, 1920, the Commission, pursuant to resolution theretofore adopted (Rec. p. 11), sent to the appellees, and to practically all corporations engaged in the production and sale in interstate commerce of finished or semifinished steel products, some of whom were also engaged in the production of coal and coke, blank schedules, which the corporations were requested to fill out and return to the Commission. Their attention was invited to the provisions of the Federal Trade Commission Act which prescribes penalties for failure by corporations to comply with any lawful order of the Commission. Rearranging somewhat the order in which the data were called for on the schedules to conform to our subsequent discussion, these schedules and the accompanying instructions required the appellees to report monthly the following information:

(A) Sales prices at which specified products were sold in the domestic market during the specified month, and the quantity, value, and average realization per ton; and the same information for export shipments. (Rec. pp. 21-22.)

(B) Identical information with respect to contract prices. (Rec. pp. 23-25.)¹

(C) Copies of the companies' monthly cost sheets showing the cost of producing specified products. (Rec. pp. 18-19.)

¹ For explanation of terms "Sales Prices" and "Contract Prices," see Schedules. (Rec. pp. 20, 23.)

(D) Any depreciation and general administrative and selling expenses not already included in costs (if any such segregation had been made by the companies). (Rec. p. 28.)

(E) The tonnage produced during the month. (Rec. pp. 15-17.)

(F) The capacity for production. (Rec. p. 26.)

(G) Quantities of products for which orders were booked during the month and unfilled orders on hand at the end of the month. (Rec. p. 27.)

(H) Income statement and balance sheet. (Rec. pp. 29-34.)

While the sheets of the schedules devoted to prices and costs list a number of products, it should be understood that none, or but few, of the very large companies make all of such products, and that therefore the reports of a single company would ordinarily include the prices and costs of only a few of the products designated.

In requesting the information respecting costs of producing steel products, the Commission did not differentiate between the costs of producing products moving in interstate commerce and costs of products moving in intrastate commerce. Separate cost records for products moving in interstate and intrastate commerce are not kept. The amended answer alleges that the interstate and intrastate commerce of each of the appellees is conducted as a single, nonseparable whole. (Rec. p. 79.)

basic commodities would, in its opinion, be of the greatest value to the country at large, to Congress, to the courts, to the prosecuting arm of the Government, and to business itself, in ascertaining causes of the conditions existing. Asked what articles or industry should be investigated, the then Chairman of the Commission suggested fuel, steel, and several other basic commodities. (Hearings First Deficiency Appropriations Bill, Fiscal Year 1920, p. 24 et seq.)

Accordingly, the following item was inserted in the Deficiency Appropriation Act, approved November 4, 1919:

Federal Trade Commission: For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, *or within the scope of its powers*, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, *or other necessities*, and the products or by-products arising from or in connection with the preparation and manufacture thereof, *together with figures of cost and wholesale and retail prices*, \$150,000.

Pursuant to the wish of Congress expressed in the above law, and acting under the powers which it believed to be conferred upon it by the Federal Trade Commission Act, the Commission, by resolution adopted December 15, 1919 (Rec. p. 11), instituted an inquiry, the first step in which was to require practically all corporations engaged in the manufacture and in the sale in interstate commerce of steel and

coal to make the reports which, in the instant case, the court below holds the Commission can not lawfully require.

Holding of the Courts Below.

The Supreme Court of the District of Columbia held (1) that the power of Congress to regulate the business of corporations engaged in interstate commerce and the exercise of the visitorial power of Congress over the business of such corporations is always limited to information respecting their interstate business; (2) that the information required in the Commission's schedules has to do almost wholly with the manufacturing operations, and with the interstate commerce of the corporations, over which business Congress does not have jurisdiction; and (3) that Section 6 of the Trade Commission Act does not empower the Commission to require information except as respects the interstate commerce of corporations.

The Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court, and upon the same general grounds. The opinion of that Court apparently goes further, however, and holds that the regulating power of Congress under the Commerce Clause extends only to transportation of commodities by instrumentalities of commerce, and not to the purchase and sale of commodities between parties in different states.

Detailed Assignment of Errors appears at pp. 129 to 134 of the Record.

The Questions Presented.

The Assignment of Errors raises the following general questions:

(1) Has Congress the power to compel corporations to supply information within the field over which it has power to legislate in order to learn whether remedial laws are required for the national welfare?

(2) Under the Commerce Clause, does the power extend not only to procuring information respecting interstate commerce itself, but also to procuring information respecting intrastate commerce and manufacture, where such information will reveal whether the law of supply and demand is operating in interstate commerce, or whether such commerce is being unduly burdened.

(3) As a means of procuring information which Congress may itself require, may it constitutionally confer upon an administrative body authority to compel corporations to supply information, by resort to the courts, if necessary, respecting a subject over which it has jurisdiction (1) for transmission to Congress; and (2) as a basis of reports to Congress and of recommendations to Congress for legislation by such administrative body.

(4) As an incident to its power to regulate interstate commerce, may Congress constitutionally authorize an administrative body to ascertain and publish the facts respecting the conduct, organization, management, business, and practices of corporations engaged in interstate commerce?

(5) Was the Commission's demand for the reports a Constitutional exercise of the visitorial power of the Federal Government over corporations engaged in interstate commerce?

(6) Does the Federal Trade Commission Act authorize the Commission to require the production of the information called for in the schedules?

(7) If the statute, properly construed, requires the corporations to furnish the information, is it unconstitutional as authorizing unreasonable searches and seizures within the Fourth Amendment to the Federal Constitution, or as depriving the corporations of property without due process of law within the Fifth Amendment to that instrument?

History of the Times in Which Congress Created the Trade Commission.

As this suit brings the constitutionality and construction of portions of Sections 6, 9 and 10 of the Federal Trade Commission Act for the first time before this court, a review of the times in which the legislation was enacted, as throwing light upon the Congressional purpose, becomes material and, we believe, helpful.

For several years prior to the creation of the Commission consideration had been given, both in Congress and by the public, to the establishment of a commission with powers over industrial corporations engaged in interstate commerce. Exhaustive hearings had been conducted in 1911-12, under Senate Resolution 98 (62d Congress, 2d session), and as a result the appropriate committee reported that the creation of a trade commission might be

helpful in the administration and enforcement of the antitrust law. (Senate Report 597, 63d Congress, 2d session). The platform of the great political parties for 1912 declared for the creation of such a commission. President Wilson's Message to Congress of January 20, 1914, contained the following:

And the business men of the country desire something more than the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance, and information which can be supplied by an administrative body, an interstate trade commission.

The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

As a result presumably of the extended consideration previously given to the question, and of the President's recommendation, the proper committees of both houses of Congress took up in 1913 the consideration and drafting of measures for the creation of a trade commission, and the present law was enacted.

Previous Legislation.

There had been in existence since 1903, first in the Department of Commerce and Labor and later in the Department of Commerce, the Bureau of Corporations. The principal provisions of the Act creating that Bureau were as follows:

SEC. 6. * * *

The said commissioner (of corporations) shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation, joint-stock company, or corporate combination engaged in commerce among the several States and with foreign nations, excepting common carriers subject to "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce, and to report such data to the President from time to time as he shall require; and the information so obtained or as much thereof as the President may direct shall be made public.

The purpose of the Congress in 1914 appears to have been materially to enlarge the powers of the Bureau of Corporations by including the power to require annual and special reports of corporations

(paragraph 6)¹ and "compulsory publicity" thereof (paragraph 35), to make investigations at the request of the President or either House of Congress and "report the facts relative to any alleged violation of the antitrust acts" (paragraph 20), to make recommendations for legislation "only after the most exhaustive investigation by trained experts" (paragraphs 34-35), to make recommendations for the readjustment of business of corporations found by the courts to be in violation of the antitrust laws (paragraphs 26-27), and to place the exercise of these powers in the hands of a bipartisan commission "removed entirely from the control of the President and the Secretary of Commerce," with power to make public the information obtained in its own discretion (paragraph 11).

Provisions of the Trade Commission Act Directly Involved in this Suit.

This suit involves primarily certain provisions of Sections 6, 9, and 10 of the Trade Commission Act. These provisions are as follows:

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate com-

¹ The paragraph numbers in this paragraph of the text have reference to numbers in Appendix A, House Report No. 533, 63d Congress, 2d session.

merce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

* * * * *

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

* * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit there-

with recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

* * * * *

SEC. 9. Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

SEC. 10. * * *

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Broadly stated, the above provisions authorize the Commission to ascertain the facts respecting the organization, conduct, management, and business of corporations engaged in interstate commerce, either by investigation or by requiring annual or special reports from such corporations, or by both of these methods, to report the facts so gathered to Congress by means of annual or special reports, to publish the facts as it may deem expedient in the public interest, and to make, on the basis of the information so gathered, and from the knowledge gained by experience, recommendations to Congress for additional legislation respecting interstate commerce.

Was it competent for Congress to create the Commission and confer upon it these powers as sought to be exercised in the instant case?

ARGUMENT.

I.

Congress Has Power to Compel the Giving of Information and Production of Documents in Any Inquiry Concerning a Subject Matter Over Which It Has Jurisdiction to Legislate.

The Commission contends that Congress has power to compel witnesses to appear and testify concerning, and to produce books, papers, and documents relating to, any subject over which it has legislative jurisdiction. This power exists not as an aid in detecting breaches of existing law, but as an auxiliary to the exercise of the legislative function.

1. The Constitution Conferred All Powers Proper for the Exercise of Each Power Expressly Granted.

Article I, Section 1, of the Constitution provides that—

* * * the legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

By Section 8 of the same article it is provided that the Congress shall have power—

to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

By these two provisions the framers of the Constitution created a legislative body and conferred upon it jurisdiction to make all laws concerning the specific subjects committed to it. A glance at the provisions of the first six sections of Article I of the Constitution reveals that no attempt is made in that instrument to enumerate all and every of the things which this body may do. It is manifest that the framers of the Constitution intended to create a legislative body such as they were familiar with from experience or from history which would have the powers, in the limited field committed to it, which such legislative bodies had within their knowledge exercised in the past.

No principle of constitutional law is more firmly established than that the grant of express power

carries with it by necessary implication all powers necessary or proper for the effective exercise of the powers expressly granted.

In the great case of *McCulloch v. Maryland* (4 Wheat. 315) this court held that an express grant of power carries with it the right to employ any means appropriate to the execution of the power. This doctrine has been repeatedly affirmed by this court. In the *Legal Tender Cases* (110 U. S. 421, 440), this court said:

By the settled construction and the only reasonable interpretation of this clause the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it.

And again (*Legal Tender Cases*, 12 Wall. 457, 536):

Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been made to execute a single power specifically given, but equally true when

the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution.

* * *

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in question. Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the Government of the United States or in any of its departments or officers, has long since been settled. In *Fisher v. Blight* (2 Cranch, 358) this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress," said this court, "must possess the choice of means and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution."

2. Among Powers so Granted is that to Acquire Information.

Among the implied powers conferred by the sections quoted is, we contend, the power to acquire information, and to this end to compel the attendance and testimony of witnesses and the production of documentary evidence respecting any subject concerning which it may legislate, in order that legislation thereon may be intelligent, effective, and within the Constitution. Comprehensive and detailed information respecting any subject committed to Congress by the Constitution serves not only to insure the effectiveness of such legislation as may be enacted but may serve to show as well the desirability of not legislating in certain respects or of not legislating at all. The passage of ill-advised legislation, enacted upon incomplete information, especially on the complex questions involved in the regulation of interstate commerce and on matters of taxation, may be avoided if Congress have before it complete information respecting the subject matter; and wise, just, and proper legislation be enacted with such information as a basis of action.

In *Interstate Commerce Commission v. Brimson* (154 U. S. 447, 476), this court said:

We have before us an act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it

to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, we repeat, not disputed and is beyond dispute. Upon everyone, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon anyone summoned by that body to appear and to testify the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents the duty of producing them if the testimony sought, and the books, papers, etc., called for, *relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion.*¹

In *Smith v. Interstate Commerce Commission* (245 U. S. 33) this court appears fairly to have determined, in a final and conclusive manner, that Con-

¹ All italics in quotations from decisions of the courts are ours unless otherwise stated.

gress has power to compel the testimony of witnesses and the production of documents in an inquiry concerning interstate commerce, and that no question of a violation of existing law need be involved in order that compulsory power may be lawfully employed.

In that case the Interstate Commerce Commission had instituted an investigation in response to a resolution of the United States Senate directing it to investigate and to report to the Senate what amount, if any, the Louisville & Nashville Railroad and certain other railroads had subscribed or expended or contributed for the purpose of preventing other railroads from entering any of the territories served by any of such railroads, for maintaining political or legislative agents, for creating sentiment in favor of any of the plans of any of said railroads, and to ascertain and report as well the relation of the railroads named to one another, the control, if any, exercised by the Louisville & Nashville over the others by stock ownership, leases, or arrangements, and whether, but for these, the railroads would be competitive, and whether through such means rates were fixed and maintained. The questions to which answers were refused by the plaintiff Smith were limited to expenditures or contributions by the company for political campaign purposes, and for the purpose of preventing rate reductions in Alabama, and if such expenditures had been made how they were charged in the accounts of the railroad company. The railroad company con-

tended that the powers of the Interstate Commerce Commission were limited practically to the enforcement of the Act to Regulate Commerce, and that the act did not attempt to regulate the political activities of common carriers or the subject of their endeavoring to exclude competitors from their territory. The court held (at p. 42) that the appellant should be required to answer the questions:

The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public. And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. * * * By Sec. 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (Sec. 13) institute an inquiry of its own motion, and may (Sec. 20) require detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records, and memoranda to be kept. *And it is required to report to Congress all data collected by it.*

It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections, and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no farther. They are incidental to an investigation as to the "manner and method" (Sec. 12) in which the business of the carriers is conducted; they are in requisition of a detailed account of their expenditures and revenues and an exhibit of their financial operations (Sec. 20), and the answers to them may be valuable as information to Congress (Sec. 21). 245 U. S. at pp. 42, 43, 44.

To the contention that the Commission could only require information "as to any matter or thing concerning which a complaint is authorized to be made, * * * or concerning which any question may rise under any of the provisions of the Act," in support of which the decision in *Harriman v. Interstate Commerce Commission* (211 U. S. 407) was cited, the court said, at page 44, in part:

To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy, and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407.

Appellant presses that case beyond its principle. And we may observe that Sec. 13 has been amended and broadened since the decision of that case. The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that and comes within *Interstate Commerce Commission v. Chicago, R. I. & Pac. Ry.* * * * (Id. pp. 44, 45.)

To the contention that the questions relating to expenditure of money in Alabama in the campaign against rate reductions did not fall either within the Commission's powers under the statute or within the terms of the Senate Resolution, the court said, at page 46, in part:

Abstractedly speaking, we are not disposed to say that a carrier may not attempt to mould or enlighten public opinion, but we are quite clear that its conduct and the expenditures of its funds are open to inquiry. If it may not rest inactive and suffer injustice, it may not on the other hand use its funds and its power in opposition to the policies of government. Beyond this generality it is not necessary to go. The questions in the case are not of broad extent. They are quite special, and we regard them, as the learned judge of the court below regarded them, as but incident to the amount of expenditures and to the manner of their charge upon the books of the companies. This, we repeat, is within the power of the Commission. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any

way affect their relation to the public. We can not assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling. (Id. p. 46.)

The power of Congress to require the production of information respecting subjects committed to its jurisdiction other than interstate commerce has been recognized and upheld by this court. In the case of *In re Chapman* (166 U. S. 661) this court held valid a law of Congress making it a criminal offense for any person, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully to default or refuse to testify upon any question pertaining to the matters under inquiry. The court was of opinion that where the subject matter was within the jurisdiction of the two Houses and the information demanded was pertinent to the subject it was competent for Congress to demand it.

The doctrine announced by the state courts and commentators, by the great weight of authority, is that legislatures have the constitutional power to compel testimony and the production of documents by corporations in inquiries looking to the enactment of legislation.

In *McDonald v. Keeler* (99 N. Y. 463) the court said:

(481) The power of obtaining information for the purpose of framing laws to meet sup-

posed or apprehended evils is one which has from time immemorial been deemed necessary and has been exercised by legislative bodies.

* * * * *

(482) It is difficult to conceive any constitutional objection which can be raised to the provision authorizing legislative committees to take testimony and to summon witnesses. In many cases it may be indispensable to intelligent and effectual legislation to ascertain the facts which are claimed to give rise to the necessity for such legislation, and the remedy required, and, irrespective of the question whether in the absence of a statute to that effect either house would have the power to imprison a recusant witness, I can not yield to the claim that a statute authorizing it to enforce its process in that manner is in excess of the legislative power. * * *

These views are supported by the decision of this court in *Wilckens v. Willet* (1 Keyes 521), where it was held that the House of Representatives of the United States had the power to compel the attendance of witnesses. In that case this court said per Johnson, J.: "That the power exists, admits of no doubt whatever. It is a necessary incident of the sovereign power of making laws, and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation. The power is rather judicial in its nature; but in a legislative body it exists as an auxiliary to the legislative power only."

* * *

(483) Throughout this Union the practice of legislative bodies, and in this State, the statutes existing at the time the present constitution was adopted, and whose validity has never before been questioned by our courts, afford strong arguments in favor of the recognition of the right of either house to compel the attendance of witnesses for legislative purposes, as one which has been generally conceded to be an appropriate adjunct to the power of legislation, and one which, to say the least, the State legislature has constitutional authority to regulate and enforce by statute.

The doctrine of this case was followed in *People v. Sharp* (107 N. Y. 427, 14 N. E. 319; and *People ex rel. Bender v. Milliken*, 185 N. Y. 35, 77 N. E. 872).

Massachusetts authorities are in accord. In *Shepard v. Bryant*, 191 Mass. 591, 78 N. E. 394, the court said:

It is very evident that the Legislature, in view of the state of things then and immediately theretofore existing in this community as to the lack of coal, was thoroughly aroused and, with a view to some legislation, was determined, if possible, to probe to the bottom the circumstances relating to the supply of coal. The order was very sweeping. Under it the committee could properly inquire into the conduct of every coal dealer in the commonwealth, so far as it related to receiving, supplying, or selling coal, or holding or detaining or unloading coal barges at the harbors or wharves.

This phase of the law was settled in Massachusetts as early as 1859 by the decision in *Burnham v. Morrissey*, 14 Gray 226.

The above authorities state the rule which obtains in the courts generally:

The rule deducible from the authorities seems to be that the power of a legislature to investigate, through a committee or commission, the affairs of a private person, corporation, or institution, exists only when such affairs are directly related to the legitimate subjects of legislation. As is said in the reported case (*Greenfield v. Russel*, 9 A. L. R. 1334), a legislature has power to obtain information concerning any subject on which it has power to legislate, with a view to its enlightenment and guidance, but it can not violate the constitutional rights of any institution or individual by conducting a public and judicial investigation of any charges made against such person or institution under the pretense or cloak of its power to investigate for the purpose of legislation. (Note 9 A. L. R. 1341.)

In the recent cases of *Stafford v. Wallace* (258 U. S. 495) and *Board of Trade v. Olsen* (262 U. S. 1) this court recognized the fact that committees of Congress framing the legislation there upheld had before them facts from the reports and hearings of the Federal Trade Commission and from other sources, tending to show that transactions in stockyards and on grain exchanges imposed an undue burden upon interstate commerce, and in the *Stafford* case held

that where Congress decided that certain transactions threaten unduly to burden the freedom of interstate commerce, this court would not substitute its judgment for that of Congress "unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent" (p. 521). It is not conceivable that the court will now hold that, despite the duty of Congress primarily to make this determination, it can not procure the information on which to base its conclusions unless it is voluntarily produced. So to hold would render it possible for those having the information in their possession to defeat the exercise of the legislative function.

Further it is said, the right to provide (an army) is not denied by calling for volunteer enlistments, but it does not and can not include the power to exact enforced military duty by the citizen. This however but challenges the existence of all power, for a Governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power. (*Selective Draft Law cases*, 245 U. S. 366, 377.)

3. It is Not Necessary to Establish in Each Instance that the Information Required is Indispensable to Legislative Action.

Appellees appeared to admit in the court below that if the information is indispensable to legislation, its production may be compelled, presumably on the theory that the power to compel its production is not expressly granted and that only those powers are implied which are indispensably necessary to carry

into effect some power expressly granted. But the decisions reviewed above (*supra*, pp. 19-25) *demonstrate beyond question that any power will be implied, and any means may be employed which are appropriate to carrying out the powers expressly granted.* Moreover, appellees confuse the existence of the implied power with the wisdom, in a particular case, of the exercise of a power held to be implied. Once the existence of a power is declared by this court it is established for all time and may be exercised from time to time under varying circumstances in the wisdom of Congress.

No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. Nor may the court enquire into the wisdom of the legislation. Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence. (*Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161.)

The indispensable character of the information is a question which Congress alone can determine. Can the courts, under the separation of powers in the Federal Constitution, hold that persons required to produce information by Congress may in each instance come to the courts for a determination whether it is indispensable to the exercise of the legislative power? Or to put it in a more forceful manner, must Congress constantly resort to the courts for a determination of what is or what is not

necessary to the proper exercise of a power conferred upon Congress by the Constitution? We think not. The distinct holding in the *Chapman*, *Brimson*, and *Smith cases*, *supra*, is that the only question for the courts to determine is, not whether the information is indispensable, but whether it pertains to a subject over which Congress has jurisdiction.

4. The Specific Character of the Action Contemplated by Congress Need Not be Shown in Order that Information may be Required.

Appellees contended also that unless the Commission can show just how Congress could legislate in the light of the information required its production can not be compelled. This contention was made and its soundness denied by the court in the *Chapman case*, *supra*, in the following language:

Nor will it do to hold that the Senate had no jurisdiction to pursue the particular inquiry because the preamble and resolutions did not specify that the proceedings were taken for the purpose of censure or expulsion if certain facts were disclosed by the investigation. The matter was within the range of the constitutional powers of the Senate. The resolutions adequately indicated that the transactions referred to were deemed by the Senate reprehensible and deserving of condemnation and punishment. The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member. * * *

* * * Indeed, we think it affirmatively appears that the Senate was acting within its

right, and it was certainly not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation was concluded. (166 U. S. at pp. 669-670.)

5. Information Respecting Prices May be Required, Though no Power to Fix Reasonable Prices Exists.

It was contended below that Congress was without power to fix prices in any save quasi public businesses, and that this being true, Congress could not require information respecting prices. To this we reply that this Court will not assume in advance that if the information should disclose high prices and very large profits, Congress has not sufficient wisdom and constructive ability to find some remedy for the situation short of fixing prices. Congress is entitled to an opportunity to exercise its function within its best judgment and then, if it transcend its powers, this Court will declare its action invalid.

Furthermore, appellees' contention assumes that if there are high prices and large profits, they are due to natural causes and not to artificial burdens or restrictions which it may be within the jurisdiction of Congress to remove. One of the purposes of the inquiry was to ascertain not only what prices obtained but what were the causes. When Congress is in possession of this information, it may exercise its judgment with respect to the remedy with the knowledge that the constitutionality of its action must be passed upon by this Court.

6. Information Required Should be Had at Least as to Articles of Prime Necessity.

For many years the common law recognized the difference in the interest which the public has in the prices of articles of prime necessity and the prices of those articles which are not requisites of daily life. Prior to the passage of antitrust laws, State and Federal, the courts consistently refused their aid in the enforcement of contracts to fix the prices of necessities, or of contracts the effect of which was to lessen or eliminate competition in such commodities (*United Shoe Machinery v. La Chapelle*, 212 Mass. 467, 480; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Raymond v. Leavitt*, 46 Mich. 447; *Dutton v. Knoxville*, 121 Tenn. 26, 113 S. W. 381; *Arnolt v. Coal Co.*, 68 N. Y. 558; *Morris Tun Coal Co. v. Barclay*, 68 Penn. St. 176), while sustaining similar contracts concerned with articles not of prime necessity (*Gloucester Ising Glass Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 105; *Central Shade Roller Co. v. Cushman*, 103 Mass. 353, 9 N. E. 629; *Anheuser-Busch Brewing Assn. v. Houck*, 27 S. W. 692, affirmed 30 S. W. 869; *Pacific Factor Co. v. Adler*, 27 Pac. 36). In the decisions cited the courts have held that coal, flour, and matches, and classes of articles generally described as "foodstuffs," "necessaries of life," "pure necessities," "indispensable commodities" are among those articles which are of such importance to the public welfare that agreements restricting competition therein were void at common law.

It is apt and proper to apply this distinction in considering the power of Congress to require infor-

mation as a basis of legislation and in construing the terms of the Trade Commission Act and to hold that the information required in the questionnaires may be had at least with respect to articles of prime necessity or with respect to such articles of that class as have become indispensable to the daily life and commerce of the people. It may be here pointed out that the Act of Congress appropriating the sum of \$150,000 for the work which the Commission was just beginning when stopped by the injunction, made the money available for information regarding "food-stuffs or other necessities" (*supra*, p. 8).

The foregoing discussion leads to the conclusion that Congress has the power to procure information as an aid to legislation, and that the only questions for the courts to determine, where the power is challenged are (a) whether the inquiry is with respect to a subject-matter committed to its jurisdiction, (b) whether the information demanded is relevant to the subject-matter, and (c) whether any constitutional guaranties of the citizens are invaded.¹ Before developing these points in the case at bar, however, we believe it appropriate to show that the authorization of the Commission to secure information for Congress was constitutional.

¹ It appears to be established law in practically all English-speaking countries that the testimony of witnesses and production of documents may be compelled in inquiries which do not involve any question with respect to a breach of existing law. It is held that compulsory power may be exercised by the legislative body or by commissions created by such bodies where the subject matter is one within the legislative jurisdiction of the law-making body and the evidence required is pertinent to the subject matter of the inquiry. In several decisions about the middle of the last century the Privy Council held that legislative assemblies of the

II.

Congress Can Constitutionally Authorize an Administrative Body to Collect Information Respecting Any Subject Over Which It Has Legislative Jurisdiction.

Congress may, without violating the principle that legislative power may not be delegated, authorize an administrative body to collect information respecting any subject over which Congress has jurisdiction. This contention may be rested upon any one of three grounds—(1) that the power to collect information is not per se legislative power but is power which may be delegated; (2) that if it be legislative power, the Trade Commission Act lays down a sufficiently definite rule for the guidance of the Commission, and it does not therefore amount to a delegation; and (3) that the creation of a Commission for the purpose of procuring information for Congress and for the other purposes specified in Section 6 of the Trade Commission Act is an appropriate and constitutional means for carrying into execution the power of Congress to legislate on specific subjects.

Each of these points is discussed below:

1. Legislative power within the meaning of the Constitution is the power to make, amend, alter, or

English colonies did not have power to punish for *contempt* witnesses who refused to appear and testify. (*Kilbourn v. Thompson*, 103 U. S. 168; *Keilley v. Carson*, 4 Moore's P. C. 63; *Fenton v. Hampton*, 11 Moore's P. C. 347.) These decisions do not deny to the power of these bodies to make it an offense, punishable by fine and imprisonment, to refuse to appear and testify with respect to any subject-matter concerning which the legislature may pass laws. (*In re Chapman*, 166 U. S. 661.) In nearly all if not all of the British self-governing dominions statutes were enacted, apparently subsequent to the decisions of the Privy Council above

repeal laws. (Watson on the Constitution, p. 114.) Vesting Congress with "all legislative powers herein granted" has been held to mean that Congress may in its discretion enact any appropriate legislation to accomplish the objects for which the National Government was established. (*Burton v. U. S.* 202 U. S. 367). That Congress possesses powers other than those purely legislative, and susceptible of dele-

referred to, authorizing the appointment of Commissions of Inquiry with power to summon witnesses, which laws provide that it shall be a criminal offense for any person to refuse to appear and testify. (Revised Statutes of Canada, 1906, Ch. 104, amended by Canadian Statutes 1912, Ch. 28; Original Act 31 Vict. Ch. 38; Revised Statutes Manitoba, Ch. 34, Original Act known as Public Inquiries Act, 1873; Public Inquiries Act, Revised Statutes British Columbia, 1911, Ch. 110; New Zealand Commissions of Inquiry Act, 1908; Royal Commissions Act, New South Wales, 1901, Sec. 3.) These acts have been uniformly upheld by the highest courts of the Provinces and Federated Governments, which hold that if the inquiry relates to any of the classes of subjects over which the Government enacting the law has legislative jurisdiction it is valid. In *Northwest Grain Dealers' Association v. Hyndman*, 61 Dom. Law Rep. 548 (Manitoba Court of Appeals, November 4, 1921), the Chief Justice says:

"If the inquiry relates to any of the classes of subjects assigned to the Dominion Parliament by Section 91 [British North American Act], authority for the inquiry is given by Section 2 of the Inquiries Act. Even if, as I have above intimated, the order in council or commission covered only one of the subjects it would be valid, but the powers of the commission to compel witnesses to attend and give evidence would be limited to that subject. * * *

"I have no doubt as to the power of the Dominion Parliament to enact the Inquiries Act, R. S. 1906, Ch. 104. The main objection taken is that the expression 'the good government of Canada in Section 2 taken in its widest sense includes provincial subjects of legislation.' The expression was intended to apply to acts and matters coming within the legislative jurisdiction of the Parliament of Canada as that jurisdiction is defined in the B. N. A. Act and interpreted by authoritative decisions. We must assume that Parliament did not intend to exceed its powers in passing the Act. The intention was that commissions appointed under the Act should confine their inquiries to matters into which the Government of the Dominion might lawfully inquire."

To the same general effect are *Kelley & Sons v. Mathers* (23 Dom. Law. Rep. 225) sustaining the Public Inquiries Act of Manitoba; *Re Public Inquiries Act* (48 Dom. Law Rep. 237) sustaining the Public Inquiries Act of British Columbia; *Cock v. Attorney General* (28 New Zealand L. R.

gation, has been recognized by this court since the early decisions under the Constitution. In *Wayman v. Southard* (10 Wheat. 1, 42, 43) Chief Justice Marshall says:

It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the

405) holding valid the Commissions of Inquiry Act, 1908; *Clough v. Leahy* (2 Commonwealth Law Rep. 129) upholding the Royal Commissions Evidence Act of New South Wales (Stats. 1901, Sec. 3).

In *Attorney General of Australia v. Colonial Sugar Refining Co.* (A. C. 1913) the Privy Council held the Royal Commissions Act of Australia No. 12 of 1902 (No. 4 of 1912) unconstitutional for the reason (1) that the General Government of Australia had no power under the constitution to impose new duties on the citizens of the states, and (2) that the terms of that statute were so broad as to include many subjects over which the General Government had no jurisdiction. The decision apparently concedes, however, that had the statute been confined to subjects over which the General Government had jurisdiction it would have been valid. In a very recent decision by the *Privy Council* (*Attorney General of Canada v. Attorney General of Alberta* (1922 A. C. 191) Lord Haldane, who wrote the decision of the Privy Council in the Colonial Sugar Refining case, *supra*, referring to the powers of the Canadian Parliament, said:

"It may well be that it is within the power of the Dominion Parliament to call, for example, for statistical and other information which may be valuable for guidance in questions affecting Canada as a whole. Such information may be required before any power to regulate trade and commerce can be properly exercised, even where such power is construed in a fashion much narrower than that in which it was sought to interpret it in the arguments at the bar for the Attorney General of Canada."

In the British Isles it has been common in recent years for Parliament to create commissions to inquire into matters of general public concern, but not involving any alleged violation of law; to confer upon such commissions power to summon witnesses and compel the production of documents and in this connection to provide that refusal to answer questions or produce documents shall be either a penal offense or punishable as contempt. Examples of such Acts are: Coal Commission Act, 9 Geo. 5, Ch. 1, Public General Acts, 1919; Profiteering Acts, 1919 and 1920, 9 and 10 Geo. 5, Ch. 66, Public General Acts, 1919, and 10 and 11 Geo. 5, Ch. 13, Public General Acts, 1920; Mining Industry Act, 1920, 10 and 11 Geo. 5, Ch. 50, Public General Acts, 1920; Trades Board Act, 1909, 9 Edw. 7, Ch. 22, Chitty's Statutes, Vol. 8, pp. 837, et seq.

legislature may rightfully exercise itself.
 * * * The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

Procuring information as a basis for legislation is not in itself legislation, and directing an administrative body to procure such information is not authorizing it to legislate. This court in the case of *I. C. C. v. Goodrich Transit Co.* (224 U. S. 194) held that requiring information concerning a business is not regulation of that business. It would appear to be equally true that requiring information concerning a business is not in itself legislating with respect to that business—i. e., exercising the power to make, amend, or repeal laws—but only a necessary incident to the exertion of that power, an indispensable incident to its intelligent and effective exercise.

The legality of delegating to committees of legislative bodies and to commissions power to make investigations and report facts to such bodies has been expressly upheld or assumed in a number of cases. The statute upheld in the *Chapman case*, *supra*, made it an offense to refuse to testify before committees of Congress, and the decision in *Smith v. Interstate Commerce Commission*, *supra*, sustaining the power of the Commission to compel the pro-

ducing of information in an investigation not concerned with a violation of law is consistent only with the proposition that the delegation of authority to procure it was lawful. The Court of Appeals of New York has held that commissions may be lawfully authorized to make such inquiry and that "the function so performed by the commission is strictly analogous to that of a legislative committee of inquiry or investigation." (*People ex rel. Bender v. Milliken*, 185 N. Y. 35.)

2. If, however, the power of Congress to procure information is per se legislative power within the meaning of the Constitution, it is nevertheless contended that Section 6 of the Trade Commission Act lays down a sufficiently definite guide for the Commission and is not therefore unconstitutional as amounting to a delegation. (*Field v. Clark*, 143 U. S. 649; *Union Bridge Co. v. U. S.*, 204 U. S. 364; *Buttfield v. Stranahan*, 192 U. S. 470.) That section authorizes the Commission to make investigation into and require annual and special reports concerning "the organization, business, conduct, practices, and management" of corporations engaged in interstate commerce. This language is quite as definite as that portion of Section 12 of the Act to regulate commerce which authorizes the Interstate Commerce Commission "to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the

same is conducted." That statute was upheld by this court in *Smith v. Interstate Commerce Commission*, *supra*, and in *Goodrich Transit case*, *supra*. Other statutes much broader and less definite than the quoted portions of the Trade Commission Act and reposing broader discretion in executive officers or administrative bodies have been held by this court not to amount to an unconstitutional delegation. (*U. S. v. Grimaud*, 220 U. S. 506; *Union Bridge Co. v. U. S.*, 204 U. S. 364.)

The discretion reposed in the Commission in the present relation by the statute is obviously neither as broad nor susceptible of such oppressive use as that reposed in other officers of the Government by the statutes upheld in the cases cited.¹

3. Under the complex conditions of modern civilization it is manifestly impossible for Congress, operating through committees, to procure the vast amount of data desirable as a basis of considering legislation on such matters as the regulation of commerce, the passage of tax measures, including tariff laws, and similar intricate and difficult subjects with which Congress must deal almost continuously. If Congress itself has the power to compel the production of information respecting such subjects, it is submitted that the creation of an administrative body for this purpose is a proper means for carrying

¹ Not including investigations instituted at the direction of the President during the World War and inquiries growing out of those investigations, it may be noted that of approximately 34 general inquiries into industrial conditions conducted by the Commission since its organization 27 were directed by resolutions of either the Senate or House of Representatives, 2 by the President, and only 5 instituted on the initiative of the Commission.

into effect its power. Since the decision of this court in *McCulloch v. Maryland* (4 Wheat. 315, 422) it has never been doubted that Congress may adopt any appropriate means of carrying into execution any power or powers expressly granted to it.

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional. (*McCulloch v. Maryland*, 4 Wheat. 315, 421.)

By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary without which the powers granted must fail of execution, but they include all appropriate means which are conducive or adapted to the end to be accomplished and which in the judgment of Congress will most advantageously effect it. (*Legal Tender Cases*, 110 U. S. 421, 440. See also *United States v. Fisher*, 2 Cranch, 358, 396; *First National Bank v. Union Trust Co.*, 244 U. S. 416, 424.)

That Congress itself considers the means appropriate is shown by its repeated use in the creation of such bodies as the Interstate Commerce Commission, the Tariff Commission, the recent Coal Commission, and similar bodies, and by the power conferred on the Secretary of Agriculture by the Packers and Stockyards Act of 1921 and the Grain Futures Act.¹

¹ 42 Stat. 159; 42 Stat. 996, respectively.

We now pass to the consideration of the questions whether the subject matter is within the jurisdiction of Congress and whether the information required is pertinent to the subject matter.

III.

Jurisdiction of Congress Over Interstate Commerce and Extent of the Power to Require Information.

1. Commerce Among the States Includes the Purchase and Sale of Commodities Between Citizens in Different States.

The extent of the jurisdiction of Congress over commerce among the States has been so often defined by this Court on such a variety of facts and in such varying circumstances that any discussion of it here would be unnecessary were it not for the fact that the Court of Appeals appears to have been of the opinion that interstate commerce comprehends only transportation and matters immediately connected with transportation. (Rec. pp. 119 et seq.) So to hold would be contrary to the decisions of this Court from its inception. Even to suggest such a construction casts doubt where from the beginning there has been nothing but certainty, and freely concedes jurisdiction in the very field where for a time its existence was seriously questioned. The purchase and sale of commodities between persons negotiating from different states, followed by the transportation of commodities to other states, has always been held to be interstate commerce.

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not

of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. (*Gibbons v. Ogden*, 9 Wheat. 1, 188.)

The accuracy of this holding has never been questioned. On the contrary, the statement of Chief Justice Marshall has been amplified, and interstate commerce held to comprehend all contracts and negotiations looking to the introduction of commodities from one State to another. (*Crenshaw v. Ark.*, 227 U. S. 389; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Stewart v. Michigan*, 232 U. S. 665; *Rearick v. Penna.*, 203 U. S. 507; *Dozier v. Ala.*, 218 U. S. 124; *Davis v. Va.*, 236 U. S. 697.) The purchase of commodities within a State, where the proven course of business was that commodities so purchased were always shipped to another State, has specifically been held to be a part of interstate commerce (*Dahnke - Walker Milling Co. v. Bondurant*, 257 U. S. 282), as well as the sale at destination after shipment from other States (*Swift & Co. v. U. S.*, 196 U. S. 375; *Brown v. Maryland*, 12 Wheat. 419; *Stafford v. Wallace*, 258 U. S. 495).

Control by the Federal Government over railroads, telegraph companies, telephone companies, and other means of transportation and transmission of intelligence was assumed originally on the theory that they were agencies or instrumentalities of that traffic and barter and sale which had always been recognized as interstate commerce. (*Gibbons v. Ogden*, 9 Wheat. 1; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1; *Telegraph Co. v. Texas*, 105 U. S. 460.)

In view of the historical development of the construction of the commerce clause it can not now be held that the power to regulate commerce extends only to the instrumentalities of commerce and not to the purchase and sale of commodities.

2. Power to regulate extends to all matters which may burden or restrain interstate commerce, even though not actually a part thereof.

The power to regulate comprehends not only the direct regulation of commerce among the States but includes, as well, such incidental regulation of intrastate commerce and of manufacture as may be necessary to the complete regulation of interstate commerce; and includes the authority "to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." (*Houston & Texas Ry. Co. v. U. S.*, 234 U. S. 342, 353; *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company*, decided by this court February 27, 1922.)

"The power includes also the right to deal with acts not themselves interstate commerce, but which burden or threaten to burden or obstruct commerce (*U. S. v. Ferger*, 250 U. S. 199) and to remove or prevent the imposition of burdens or restraints upon such commerce where the persons imposing such burdens or restraints are not engaged in interstate commerce (*U. S. v. Patten*, 226 U. S. 525), or where they are not engaged in commerce either State or interstate (*Loewe v. Lawlor*, 208 U. S. 274).

In *Stafford v. Wallace*, 258 U. S. 495, this Court in referring to *U. S. v. Ferger*, *supra*, said:

It was contended that there was and could be no commerce in a fraudulent and fictitious bill of lading, and therefore that the power of Congress could not embrace such pretended bill. In upholding the act, this court, speaking through Chief Justice White, answered the objection by saying:

"But this mistakenly assumes that the power of Congress is to be necessarily tested by the *intrinsic existence of commerce in the particular subject dealt with, instead of by relation of that subject to commerce and its effect upon it*. We say 'mistakenly assumes,' because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce (*In re Debs*, 158 U. S. 564) and with a host of other acts which, because of their relation to and influence upon inter-

state commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

That the power to regulate interstate commerce includes, if need be, direct control of manufacturing operations is manifest from the decrees by which combinations of companies engaged in manufacturing and in selling in interstate commerce, held to be in violation of the Sherman Law, have been dissolved with respect to the manufacturing operations as well as with respect to sales in interstate commerce. (*Standard Oil Co. v. U. S.*, 221 U. S. 1; *U. S. v. American Tobacco Co.*, 221 U. S. 106; *U. S. v. International Harvester Co.*, 214 Fed. 987; *U. S. v. Reading Co.*, 226 U. S. 324, S. C. 253 U. S. 27.) It is significant, in view of the unqualified holding of the Court below that Congress has no jurisdiction over manufacturing, to note that the decrees in these cases do not separate these combinations horizontally and attempt to dissolve the combinations with respect to the sales in interstate commerce only, but divide them vertically, giving to each unit in interstate commerce its own manufacturing plant, mines, or other sources of supply of the commodities sold.

3. Power of Congress to Require Information Respecting Interstate Commerce is Broader than the Power to Regulate, and Extends to Ascertaining What, If any, Burdens or Restraints upon Such Commerce are Threatened.

Since, as shown in the preceding paragraphs, the power to regulate includes the right to remove burdens or restraints imposed from without the realm

of interstate commerce, Congress must necessarily have power to ascertain, by compulsory process if necessary, whether burdens or restraints threaten interstate commerce.

In *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, this Court held that the Interstate Commerce Commission could require of steamboat companies having arrangements with railroad companies for joint through carriage in interstate commerce, information not only respecting their joint rail and water interstate business, but also respecting port to port interstate water traffic, traffic wholly within the State, and information as well respecting the earnings of pleasure resorts operated by the companies. From the opinion it appears to be clear that the Interstate Commerce Commission had the power to require this information *as well for the purpose of reporting it to Congress and making recommendations for legislation, as for the purpose of administering the laws committed to it for enforcement.* There the Court said in part:

We must remember, also, in this connection, that under Sec. 21 of the Act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make. (224 U. S. at 208.)

Again, after reciting the Commission's power to require annual reports, the court said:

We think this section contains ample authority for the Commission to require a system of accounting as provided in its order and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness *and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned.* (Id. p. 211.)

* * * * *

We think the Act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in Sec. 1, it is still essential that to enable the Commission to perform its required duties, even with respect to such rates, *and to make reports to Congress of the business of carriers subject to the terms of the Act*, it should be informed as to the matters contained in the report (p. 213).

In *Stafford v. Wallace*, *supra*, this Court said, at p. 521:

Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger and meet it. This Court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.

It being, therefore, primarily the duty of Congress to ascertain the danger of such burdens, its power of inquiry must be broad enough to ascertain the facts and includes the right to require information respecting both interstate and intrastate commerce as well as production and any matter which may burden or restrain such commerce. This must certainly be true of corporations engaged both in interstate and intrastate commerce. To hold that Congress may require information respecting the interstate commerce of corporations but may not demand it as regards their commerce wholly within a state is to say that the legislature must proceed blindly in a field where the Constitution itself requires that it shall proceed with greatest care; that is, in the field of intrastate commerce, where only such regulation may be resorted to as is necessary to carry out the power conferred to regulate interstate commerce.

The greater the restriction upon the power to regulate, the more necessary does complete information respecting the business become, in order that Congress may not inadvertently transcend its powers and enact legislation which will be declared invalid when the full facts are brought out in litigation seeking to have the laws declared unconstitutional.

IV.

The Information Called for by the Questionnaires Concerns Interstate Commerce Itself, or Matters so Closely Related Thereto as to be Necessary to an Intelligent Report upon Conditions Existing in such Commerce, and may be Lawfully Required.

We shall now show (1) that the information called for by the questionnaires, taken as a whole, is necessary in order to ascertain whether the normal relation of supply to demand in interstate commerce is being disturbed; (2) that each item of the information, taken separately, relates to subject-matter concerning which the Federal Government may, in a proper case, legislate, and (3) that it is impossible to segregate the required data between the interstate and intrastate commerce.

1. The Information Is Necessary to Show Whether the Law of Supply and Demand Operates.

At the time this inquiry was instituted, prices of commodities, including necessities of life and of commerce, had reached perhaps unprecedentedly high levels. One purpose of the investigation interrupted by the injunction was to ascertain and dis-

close the causes of these high prices—whether they were due to the natural operation in interstate commerce of the law of supply and demand, or to artificial conditions obstructing interstate commerce.

For this purpose it is essential to have the fundamental data for analyzing supply and demand conditions for the more important commodities in this industry, namely, prices actually received, prices made for future deliveries, orders on the books, currently being taken and the total outstanding, as indicative of demand conditions, and the quantities produced, the capacity to produce, the costs of commodities sold, and the profits of the business, as indicative of supply conditions.

These facts when collated and compared will tend to show whether high prices were due to abnormal demand, high costs, or artificial market control, and if such control is indicated will give a substantial basis for more specific inquiry into the circumstances and the persons responsible therefor.

Such information will also serve to show whether there were any trade policies pursued which might be deemed inconsistent with the public welfare, such as excessive exports when there is domestic scarcity, or low export prices when high prices prevail in the home markets, and such as may be deemed by Congress to necessitate remedial action.

The information respecting prices charged will reveal whether prices are uniform in domestic and foreign commerce. Furthermore, to a clear understanding of prices in foreign commerce and the

causes of existing prices, information respecting prices generally charged in internal commerce is necessary. An examination of prices charged in internal and foreign commerce may disclose that internal prices are much higher than foreign prices, and that internal commerce is therefore being discriminated against. The same is true of a comparison of prices between interstate and intrastate commerce.

Again, current sales prices were requested, together with the unit cost of the commodity sold. The comparison of these two figures will show the unit profit made. If the profit be very large, resort can then be had to the statistics with respect to the quantities produced and with respect to productive capacity. If these figures show that the mills are producing to capacity, the conclusion may be reached that the high prices and large profits are due, at least in a large measure, to demand not only in excess of production but also of capacity to produce. On the other hand, these figures may disclose that the mills are producing only a fraction of their capacity and the unusual prices will have to be attributed to some cause other than demand in excess of actual or potential production. Further inquiry may disclose that the real cause can be traced to agreements to limit production or artificially to obstruct it. Information respecting quantities for which orders were booked during the month, and unfilled orders outstanding at the end of the month, will throw further light on the state of current demand and the

relation of that demand to production and productive capacity.

The balance sheets called for, together with the data as to earnings, will disclose the rate of return to the corporation on capital invested and whether the business is profitable, which is an essential factor among the conditions of supply, because unprofitable conditions in industry lead to the discontinuance of operations.

2. Each Item Required Relates to Subject Matter upon Which Congress may Legislate.

The specific classes of information called for in the questionnaires, taken singly as well as collectively, relate directly to interstate commerce or to subjects so affecting such commerce that they may be subject to federal control.

(a) *Prices*.—The essence of interstate commerce is the purchase and sale of commodities between persons in different states where interstate shipment is caused by such purchases and sales. The solicitation of such sales in states other than that from which the shipment is made, the contracts for sale and all negotiations leading up to such sales, and all acts or transactions connected with such sales are, under established law, a part of interstate commerce itself (*supra*, pp. 44–45 and cases there cited). Obviously, the prices prescribed in such contracts of sale is information respecting interstate commerce.

The Sherman Law, as construed by this court, is largely concerned with the question of prices in interstate commerce. In probably every case in

this court dealing with voluntary combinations in alleged violation of the Sherman Law, the question of the power of the combinations to "fix the price" and "arbitrarily to enhance prices"¹ in interstate commerce has been considered by the court as of prime importance in the decision. Clearly, therefore, information respecting prices of commodities sold in interstate commerce is information respecting such commerce.

(b) *Cost of commodities sold in interstate commerce.*—Information respecting the cost of a commodity sold in interstate or foreign commerce—the cost of a subject of such commerce—is information respecting that commerce and not information respecting production or intrastate commerce only. The cost of a commodity may be either (1) the cost of manufacturing it, (2) the price paid for it in interstate or foreign commerce, or (3) the price paid for it in intrastate commerce, according to whether the commodity sold is manufactured or purchased and the source from which purchased. In an inquiry respecting conditions in interstate commerce, a corporation manufacturing that which it sells would be requested to supply the cost of manufacture. Corporations purchasing in interstate commerce that which they sell would be requested to supply data as to their purchase prices and a similar request would be made if the commodities sold in interstate commerce were purchased within the state from which shipment was

¹ Chief Justice White in *Standard Oil Company v. United States*, 221 U. S. 1, 52.

made in interstate commerce. In either of these situations the cost of the thing sold in interstate commerce is information respecting interstate commerce. Where a corporation manufactures a commodity the cost of producing it will throw light both on the question of manufacture and on the question of interstate commerce, and doubtless in a proper case could be demanded by the State or Federal Government.

(c) *Statistics of production and productive capacity.*—Where corporations engage both in manufacture and in interstate commerce, the question of production and of productive capacity as affecting interstate commerce is one within federal jurisdiction. It is established by decisions of this court that agreements between companies engaged in the manufacture of commodities which they habitually sell in interstate commerce, limiting the quantity to be manufactured, and thus, by reducing the supply for sale in interstate commerce, increasing prices in such commerce, are in violation of the Sherman Antitrust Law.

In the recent case of *American Column & Lumber Company v. United States* (257 U. S. 377), the court appears to have considered that the gravamen of the offense of the defendants was the limitation of the quantity of lumber *manufactured* in order thereby to increase prices in interstate commerce. The court there said in part:

Much more of like purport appears in the minutes of the meetings throughout the

year, but this is sufficient to convincingly show that one of the prime purposes of the meetings, held in every part of the lumber district, and of the various reports, was to induce members to cooperate in restricting production, thereby keeping the supply low and the prices high, and that whenever there was any suggestion of running the mills to an extent which would bring up the supply to a point which might affect prices, the advice against operations which might lead to such result was put in the strongest possible terms. * * *

* * * This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a *combination to restrict production* and increase prices in interstate commerce, and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. * * *

* * * To call it open competition * * * can not conceal the fact that the fundamental purpose of the "Plan" was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of *production* and prices, without having any specific agreement with respect to them. * * *

Convinced, as we are, that the purpose and effect of the activities of the "Open Competition Plan" here under discussion were to

restrict competition, and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in *curtailing production* and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Antitrust Act of 1890, and the decree of that court must be affirmed.

In the instant case, if the Commission's investigation should disclose high prices and large profits, together with idle productive capacity, the Government would at least be put on notice to inquire further respecting the cause of these conditions of restricted output.

(d) *Orders booked during month and unfilled orders outstanding at end of month.*—Information respecting orders booked during the month and unfilled orders outstanding, so far as such orders relate to contracts for sale in interstate commerce, is information respecting such commerce. All contracts for the sale of commodities between persons in different states which contemplate an interstate movement of the commodity are a part of interstate commerce (*supra*, p. 45). This portion of the questionnaire asked for quantities of commodities contracted to be sold during the month, and for the total quantities of the same ordered but not yet shipped. That this is information respecting interstate commerce needs no argument.

(e) *Balance sheets.*—The balance sheets, together with the income statement called for, will serve to show the return to corporations engaged in interstate commerce upon the capital invested. Without the balance sheet the other information requested may show a large amount of operating-profit. On the other hand, the investment may be so large that the rate of profit is very small. Again, the balance sheet is a check upon the accuracy of the income statement required.

Furthermore, in order to determine the accuracy of the report as to the profits of operation and in order to ascertain what the investment is for any company, it is necessary to have a detailed balance sheet. The balance sheet must be complete to be satisfactory, and it may be, and indeed often is, true that items appear in it which are not in themselves of interest in connection with the steel business of the companies, but nevertheless are indispensable for an accurate balance-sheet statement.

The special reason for getting a balance-sheet statement of these companies in detail is to ascertain whether there are items not relevant to the steel business which may be eliminated from consideration in computing the amount of the investment employed in the steel business. Similar eliminations being made of items in the income account, it is possible to compare the earnings from the steel business with the investment therein in order to show the real rate of profit from the steel business. For example, if a company owned a large amount of rail-

road stock and received dividends therefrom, it would give a more accurate statement of what its profits from the steel business were to take such stock from the total investment and to exclude dividends from such stock in any computation of the net earnings from the steel business.

3. Impossibility of Segregating Required Data as Between Interstate and Intrastate Commerce.

From what has already been stated (*supra*, pp. 52-54) it would appear that all of the data required by the Commission are necessary to an understanding of conditions existing in interstate and foreign commerce and of the causes of the conditions. Even if this were not true, it would nevertheless be impracticable and, as respects the greater portion of the data, impossible to segregate it so as to respond to a demand for the information exclusively with respect to interstate commerce.

Take first the question of prices, where it is more nearly practicable than in any other matter to make a distinction between interstate and intrastate commerce. From the standpoint either of information regarding interstate commerce or of the regulation thereof the first thing to know is the general level of prices for the business and the changes therein from time to time; the second thing is the differences in prices in one locality or to one class of customers compared with another. Prices are made and commodities are generally sold without regard to state lines. Such internal local price discrimination as exists is not distinguished by state lines but by

natural trade boundaries or transportation cost, competition of other localities, and the like. It was not deemed necessary in these questionnaires to develop the complex facts concerning local price discriminations in interstate commerce at the outset of the inquiry. They and other discriminations in price were left rather for further study and inquiry. Moreover it would be much easier and more practicable to determine whether a sale was intended for foreign as distinguished from domestic trade than to distinguish between interstate and intrastate sales. It is quite common to keep records of sale separately for domestic and for foreign commerce, but not for interstate and intrastate commerce. Hence there being no probable important difference to be disclosed affecting sales in interstate and intrastate commerce and such differentiation in the manufacturers' books not being commonly carried and being difficult to determine therefrom, answer concerning prices exclusively for interstate sales was not called for. So far as the public interest was concerned the average of all domestic sales was deemed sufficient. In this connection it is also important to note that this is really nearly equivalent to interstate sales as all these companies (with one or two unimportant exceptions) sell the great bulk of their products in interstate commerce. To ask them to segregate the interstate part of their sales would be requiring a great deal of work for no practical purpose.

When it comes to figures of production and capacity, it is absolutely impossible to conceive, even, of a

separation of capacity used for interstate as distinguished from state business, much less to make any such return. The same plant or capacity to produce is used for products destined or ultimately directed to either kind of trade. The same statement is largely true of production quantities. For many products there is no possibility of saying when they are made whether they will go into interstate trade or into foreign trade. The commodity may be made long in advance of an order, it may be (as is especially true for pig iron and semifinished steel) indeterminate with respect to what final sales product it will be converted into. Even for important finished products there is more or less manufacture of standard specifications either "to stock" or to fill specific orders which are not determinate as to destination when produced. In other words, what is produced during a given month may be quite a different set of individual units of a commodity from the units that were sold during the same month. While they are a factor in the supply, they are not necessarily shipped immediately after they are produced and their destination may not be definitely determined until that time. It would, therefore, be generally impracticable and even impossible to make a segregation of production between intrastate, interstate, and foreign production or capacity for production. Furthermore, even if the segregated information were obtained it would be totally insufficient and defective for any useful purpose. What is needed for the

proper appreciation, criticism, or judgment of prices in interstate commerce is the data as to supply and demand as a whole. The interstate part of supply and demand can not be used alone for an intelligent judgment of prices, since the question whether the steel industry is functioning in harmony with economic laws or in subservience to manipulation has no relation to the artificial boundaries of states.

As to costs, it is obvious that these can not be separated, generally speaking, for the steel industry with respect to costs for products shipped in interstate commerce and costs for products shipped in intrastate commerce. The costs are average results for the whole quantity produced over definite periods of time. The destination generally is not and often can not be determined when the product goes through the mill and the data for making up the costs are recorded. The producing company generally could not, therefore, give interstate and intrastate costs separately. The primary purpose of the costs is to compare them with the selling prices to see if the goods are sold at a profit or at a loss. The costs are for the total quantity produced in a certain period, and they are compared with the prices of the total quantity of the same kind of goods sold during the period, due account being taken of change in inventories.

For this reason also it is evident that the prices must include not only the prices for goods sold in interstate commerce but also the prices for similar goods sold in intrastate commerce.

The Commission averred in its amended answer and it is to be taken as a verity:

* * * and these defendants further aver that the interstate and intrastate commerce of each and every of the complainants is conducted as a single nonseparable whole.

* * * that the power of Congress to obtain information is not limited to interstate commerce but may include intrastate commerce as well, when the two phases are a part of one subject.

Jurisdiction over interstate and foreign commerce can not be defeated by commingling such commerce with intrastate commerce.

The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied by commingling interstate and intrastate operations. (*Minnesota Rate Cases* 230 U. S. 352. See also *Railroad Commission of Wisconsin et al. v. Chicago, Burlington & Quincy R. R.*, 257 U. S. 563.)

V.

Congress Has Power to Provide for the Investigation of Corporations and the Compulsory Making of Reports by Them, and for the Publication of the Facts for the Purpose of Applying the Corrective Force of Public Opinion to the Practices of Corporations.

The Trade Commission Act (Section 6) not only provides for the investigation and requiring of annual reports respecting the conduct, organization, manage-

ment, and business of corporations engaged in interstate commerce but provides also that the Commission shall have power—

* * * to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and the names of customers, as it shall deem expedient in the public interest.

The legislative purpose in enacting these provisions was to invoke the force of intelligent public opinion as a corrective of practices deemed inimical to the public welfare. The conviction that proper publicity respecting methods and practices of corporations engaged in interstate commerce was one of the most efficacious methods of eliminating that which was detrimental to the public and of preventing agreements, combinations, and other monopolistic practices appears to have persisted in the legislative mind for some years immediately preceding the passage of the Trade Commission Act. The suggestion of the desirability of some bureau or department of the Government whose duty it would be to make investigations and publish facts respecting such matters first appeared in the preliminary report of the Industrial Commission of 1900 and was repeated in the final report of that body in 1902.¹ The idea first found expression in law in the Act creating the Bureau of Corporations (32 Stat. 825). It appears subsequently, in the order named, in the corporation

¹ See Appendix A, Report 533, House Committee on Interstate Commerce, on the Trade Commission Bill, 63d Congress, 2d Session, Paragraphs 17-19.

tax provisions of the Tariff Act of 1909 (36 Stat. ch. 6, pp. 11, 112-117), the Federal Trade Commission Act (ch. 311, 38 Stat. 717), and the Transportation Act of 1920 (ch. 91, 41 Stat. 456, 469).

The Corporation Tax Law provided "that returns, together with any corrections thereof which may have been made by the Commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such." By the amendment of June 17, 1910, it was provided that the returns should be open to inspection only upon order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President. To the contention that this provision, both as originally passed and as amended, was violative of the Fourth Amendment to the Federal Constitution, this court said:

But we can not agree to this contention. The taxation being as we have held, within the legitimate powers of Congress, it is for that body to determine what means are appropriate and adapted to the purpose of making the law effectual. In this connection the often quoted declaration of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 421, is appropriate: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Con-

stitution, are constitutional." Congress may have deemed the public inspection of such returns the means of more properly securing the fullness and accuracy thereof. (*Flint v. Stone Tracy Co.*, 220 U. S. 107, 175-176.)

Title III of the Transportation Act of 1920 creates a Railroad Labor Board with power to investigate and hear any dispute involving grievances, rules, or working conditions, to render decisions thereon, which shall establish standards of working conditions which are in the opinion of the Board just and reasonable and to give publicity to its decisions in such manner as the Board may determine. Its decisions are not binding upon the parties to the dispute; and no court review is provided. Power to compel testimony of witnesses and the production of documents, and to inspect the records of the companies, fully as comprehensive as that conferred upon the Federal Trade Commission is found in the Railroad Labor Board Act. This court, in *Pa. R. R. Co. v. U. S. Railroad Labor Board et al.* (decided February 19, 1923), upheld the law and aptly described the legislative purpose of its provisions in the following language:

The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to

the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it. * * *

The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for co-operation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the Act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

Section 6 of the Trade Commission Act clearly sought to apply the same corrective force to methods of industrial corporations which the Transportation Act applies to carriers and their employees. It

authorizes investigation and publication of facts. It does not, as does the Transportation Act, authorize the establishment of any standard of prices or of practices (under Section 5 it may declare that methods of competition are unfair), but the absence of such power argues for the validity of the bill rather than for its invalidity.

It is submitted that Congress, having the right to regulate interstate commerce, may adopt any means adapted to that end (*supra*, pp. 19-20), and if in its opinion investigation and publication of the facts will tend not only to correct abuses but prevent the use of practices in interstate commerce which are inimical to the public welfare it may constitutionally employ such means.

If, in the instant case, the publication of the facts respecting prices, profits, and production of steel products should show very large profits in the industry as a whole (it is always to be remembered that the costs and profits of particular companies are not to be disclosed; see Commission's answer, Rec. p. 81), and as a result some or all of the companies had voluntarily reduced their prices, who is to be heard to complain?

In the mind of Congress a "purpose of such publicity" is to encourage competition when profits become excessive.¹ Thus is to be supplied a corrective of great worth, obviating in part the necessity of the evils of litigation and legislation to maintain competitive conditions.

¹ Appendix A, paragraph 18.

It was competent also to provide as an indispensable means of ascertaining the facts in connection with such inquiry and publication that the Commission should have the power to require annual reports from corporations engaged in interstate commerce and to compel the testimony of witnesses respecting the conduct, management, etc., of such corporations, provided no constitutional guaranty is invaded. This question is discussed elsewhere in this brief (*infra*, p. 81).

It is obvious from the above that the Railroad Labor Board was not created to ascertain breaches of existing law, but to prevent by hearing, decision, and publication obstructions to interstate carriage. This Court nevertheless held the statute valid. Similarly, compulsory power may be conferred upon the Federal Trade Commission in order to procure facts for publication with respect to practices of industrial corporations, with a view to correcting such practices.

VI.

Congress Has Power to Compel the Giving of Information and Production of Documents to Ascertain Whether the Laws Which the Commission is Charged with Enforcing Are Being Violated, and Demand Therefor Falls Within the Visitorial Power of Congress Over Corporations Engaged in Interstate Commerce.

There no longer appears to be any doubt respecting the power of the Federal Government to procure from corporations engaged in interstate commerce any information reasonably necessary to the adminis-

tration of any law regulating such commerce. (*Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194.) It has been repeatedly held that the visitorial power of the states over corporations of their own creation, as well as over foreign corporations doing business within their borders, extends to requiring the production of any facts which will disclose whether the laws of the state are being observed. The visitorial power of the Federal Government over corporations engaged in interstate commerce is at least as great as that of a state over corporations of its own creation. (*Hale v. Henkel*, 201 U. S., 43; see also *infra*, pp. 84-86.)

The Commission is charged by the Trade Commission Act with preventing the use of unfair methods of competition in interstate commerce; and is also charged by Section 11 of the Clayton Act with preventing violations of Sections 2, 3, 7, and 8 of that Act.

The information required may well tend at least to show that agreements to fix prices were being made or that agreements to restrict output were in effect. These would be practices having a dangerous tendency unduly to hinder competition and would presumably be within the jurisdiction of the Trade Commission to prevent. (*Federal Trade Commission v. Beech-Nut Packing Co.*, 257 U. S. 441.) The data may disclose facts tending to show that discriminations in prices contrary to Section 2 of the Clayton Act are being made.

The appellant's amended answer alleged:

That the Federal Trade Commission required answers to such questionnaires for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication * * * and including the purpose of making reports to Congress and of recommending additional legislation to Congress. (Rec. pp. 78-79.)

VII.

The Trade Commission Act Authorizes the Commission to Require the Information and Reports Specified in the Questionnaires.

1. The Commission's Action was within the Text of the Law.

Section 6, paragraphs (a) and (b), of the Trade Commission Act, provides that the Commission shall have power to gather and compile information concerning, to investigate from time to time, and to require annual or special reports, or both, concerning the "organization, business, conduct, practices, and management of any corporation engaged in commerce" except banks and common carriers. (See supra, pp. 14-15, for these paragraphs in full.)

We submit in all earnestness that there is no trace of ambiguity in the statutory language here involved. But if such should be found, the following discussion will, we believe, resolve it in favor of our position:

Commerce is business within the definition of business as given in Webster's International Dictionary, defining the word as "offi-

cial dealings; buying and selling; traffic in general; mercantile transactions." (*City of Topeka v. Jones*, 86 Pac. 162, 163.)

Business is a more comprehensive term and comprises everything about which a person can be employed. (*Flint v. Stone Tracy Co.*, 220 U. S. 107.)

Certainly information respecting prices, costs of production, the quantity of commodities produced, orders booked, and orders remaining unfilled is information respecting the "business" of the appellee corporations within the above definitions.

2. The Commission's Action was in Harmony with the Long Interpretation of This and Other Acts by the Government.

Moreover, in seventeen years prior to the issuance of the restraining order issued in this suit, the language of Sections 6 (a) and (b) above quoted, or the less comprehensive language of the Act creating the Bureau of Corporations,¹ had been construed and administered by the Government as including information of the identical character required in the questionnaires involved in the instant case. A number of the very comprehensive reports issued by the Commissioner of Corporations contained data with respect to production, prices, and profits; and one such report on the steel industry included data respecting the costs of producing steel in practically the entire industry, showing generally average costs.²

¹ The words of that Act are "organization, conduct, and management." The comprehensive term "business" is added in the Trade Commission Act.

² Report of Commissioner of Corporations on the Steel Industry, Pt. III.

Reports of the Federal Trade Commission have contained the identical character of information.³ In fact, the Federal Trade Commission, variously constituted as it has been since 1915, has uniformly since its inception placed an interpretation upon the Trade Commission Act as regards obtaining information identical with the interpretation made when the demands were made upon the respondent corporations.

This consistent interpretation of the Act has, under the decisions of this court, an important legal effect. As early as 1832 Mr. Justice Story in interpreting a statute gave great weight to the construction which had been "practically acted upon by the government, as well as by individuals, ever since its enactment," and held that "so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition." (*U. S. v. State Bank of N. C.*, 6 Pet. 29, 39.)

From the beginning of the history of this court, "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." (*Edwards v. Darby*, 12 Wheat. 206, 209; *U. S. v. Moore*, 95 U. S. 760, 763; *Robertson v. Downing*, 127 U. S. 607, 613; *U. S. v.*

³ Pipe Line Transportation of Petroleum; Prices of Gasoline, 1915; Pacific Coast Petroleum Industry, Pts. I and II; Report on Fertilizer Industry; Grain Trade, Vols. I and IV; Causes of High Prices of Farm Implements; House Furnishings Industry, Pt. I; Report on Leather and Shoe Industry; Coal, Report on Cost of Production.

Philbrick, 120 U. S. 52, 59; *Fairbank v. U. S.*, 181 U. S. 283, 310; *U. S. v. Falk*, 204 U. S. 143, 152; *Komada v. U. S.*, 215 U. S. 392, 396.) This principle "should ordinarily control the construction of the statute by the Courts." (*Pennoyer v. McConaughy*, 140 U. S. 1, 23.)

Furthermore, Congress was fully advised, by reports made to it by the Commissioner of Corporations, of the administrative interpretation given to that Act and frequently by resolution called for such reports. That other Departments and independent establishments of the Government gave the statute the same construction is evidenced by the fact that during the World War the Commission was appealed to by the War Trade Board, the War Industries Board, and other Government agencies to invoke the Act and ascertain the facts and determine the costs of many commodities as a basis for fixing prices to be paid by the Government. Among the industries called upon by the Commission to make reports as a basis for this work were coal, coke, iron ore, pig iron, steel, copper, lead, zinc, petroleum oils, cement, tile, fire brick, lumber, cotton textiles, acids, wood chemicals, flour, and meat products.

The foregoing summary of activities is of important legal significance. The fact that a construction of an administrative branch of the Government for many years placed upon an act entrusted to its execution is "without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the govern-

ment to question its correctness," is evidently deemed conclusive in case of statutory ambiguity. (*Robertson v. Downing*, 127 U. S. 607, 613.)

Not only, as above shown, did other branches of the government forbear to "question the correctness" of the interpretation of the Trade Act by the Commission, but they had constant recourse to the Commission for information, in the full conviction that the power to obtain the facts was lawfully asserted by the Commission.

3. The Commission's Action was in Harmony with the Congressional Interpretation of the Trade Commission Act.

It should be added also that Congress when considering the Trade Commission Bill was, for reasons above shown, fully aware of the construction given by the several Commissioners of Corporations to the Act creating the Bureau of Corporations, and with this interpretation before it employed the same language, adding to it the word "business." This action amounts practically to an express adoption by Congress of the construction previously given the Act by the Government. That interpretation, as has been shown, was practically identical with that of the Commission insisted upon here.

This court has often decided that "the reenactment by Congress, without change, of a statute which had previously received long continued executive construction is an adoption by Congress of such interpretation." (*U. S. v. Hermanos*, 209 U. S. 337, 339; *Komada v. U. S.*, 215 U. S. 392, 396; *U. S. v. Falk*, 204 U. S. 143, 152.)

Appellees contend that so construed the Act authorizes the Commission to require information respecting intrastate commerce and manufacture which is beyond the power of Congress to confer. This contention, we believe, has been answered in preceding sections of this brief (*supra*, pp. 46-52) to the effect that Congress may require any information which will reveal the causes of conditions existing in interstate commerce and which may show whether that commerce is being artificially burdened (*supra*, pp. 52-55). If we be correct in that contention, then the statute should be construed as authorizing the Commission to require any information, in the field committed to it, which may be of assistance to Congress. In construing the Act to Regulate Commerce this court has repeatedly held that it confers upon the Commission authority to deal with and remove discriminations against interstate commerce arising out of intrastate rates, although there is an express provision that the Act does not apply to carriage wholly within a state. On this point this court said in the *Shreveport Rate Case*, *supra*.

We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately con-

sidered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

4. The Call for Monthly Reports was Lawful.

The Commission undoubtedly has the power to call for annual and special reports. (Section 6(b), Federal Trade Commission Act, *supra*, p. 8.)

Certainly the call would be good for the report for January, 1920. A holding that the Commission might not in advance call for a report will simply mean a slight change in the order or the making of an order each month. If the Commission may lawfully require a report for a particular month at the close of the month, or at any time subsequent thereto, the requirement of a report for that month will not be rendered illegal because accompanied by a notice that a similar report will be requested covering certain succeeding months.

A notice could properly be given that a demand would be made for the report at the proper time. This notice would render it possible for the corporations to prepare in advance to make the report, if they anticipated doing so without protest, and would thus facilitate the work both of the corporation and of the Commission. It is true that the Commission's letter which accompanied the questionnaires states that "said reports * * * are required monthly, for each month of the calendar year 1920." The use of inapt terms, which in form appear to be a requirement, can not convert that which is, in law, a notice to the corporation that a report will be required, into a demand for a report. The Commission, it is contended, is entitled to the report for the month covered by the questionnaire.

Moreover, while the requirement is referred to as a monthly report, the scope of the inquiry obviously brings it within the category of an *investigation* within the meaning of Section 6, Paragraph (a), of the Trade Commission Act, which authorizes the Commission to "investigate, from time to time, the organization, business, conduct, practices, and management of corporations engaged in interstate commerce." Investigations within the scope of this language clearly include inquiries into the current practices and business of a corporation. If the Commission, therefore, determines to investigate and report upon the current practices or business of corporations, and is of opinion that such investigation and report can be made with less annoyance to the corporations,

and less expense to the public, by having the corporation submit the current information, it may properly adopt this method rather than demand practically continuous access to the books and records of the corporations for the purpose of pursuing the investigation.

In other words, the Commission was conducting here an investigation under Section 6 (a) and not merely requiring reports under Section 6 (b).

The Commission is further authorized to make public "from time to time" such parts of the data obtained as it shall deem expedient in the public interest. This clause in itself authorizes, it would seem, the publication of the material at such periods as the Commission might deem most expedient.

VIII.

The Demand for the Information Contained in the Questionnaires in the Manner and Form Made Does Not Violate the Fourth or the Fifth Amendment to the Federal Constitution.

The Fifth Amendment.

The statute authorized the Commission to investigate the conduct, organization, etc., and to require reports from *corporations only*—not natural persons. All of the appellees, as well as all others to whom the questionnaires here involved were addressed, are corporations. Corporations are not entitled to the privilege against self-incrimination found in the Fifth Amendment to the Federal Constitution. (*Wilson v. United States*, 221 U. S. 361; *Wheeler v. United States*, 226 U. S. 478.)

The appellees have abandoned any claim that the expense of making the reports would be so great as to amount to a deprivation of property without due process of law contrary to the Fifth Amendment. (Stipulations, Rec. pp. 96, 97.) The only other question of deprivation of property under the Fifth Amendment is such as is claimed would flow from the disclosure of information. But this contention is sufficiently met by the allegation in the Commission's answer to the effect that in publishing the information it will not disclose the costs or other information with respect to any individual manufacturer and will otherwise publish only in such form and manner as will conceal rather than disclose the secrets of the business of any particular corporation. (Rec. p. 81.) The framers of the Trade Commission Act evidently contemplated that the duties of the Commission would be such that it would on occasion come into the possession of confidential information or trade secrets, since the statute expressly provides that trade secrets and lists of customers shall not be disclosed. Acquisition by the Government of information confidential in its nature, as an incident of lawful activities, where all officials and other employees are under penalty of heavy fine and imprisonment¹ not to disclose it, is not a deprivation of property in such information. The allegation that disclosure will not be made is to be taken as admitted by the motion to strike.

¹ Trade Commission Act, Sec. 10.

The Fourth Amendment.

The only remaining contention under this head is that to compel the making of reports would amount to an unreasonable search and seizure prohibited by the Fourth Amendment to the Constitution.

Both the history of this amendment and the decisions of this court indicate rather conclusively that it is applicable only to criminal proceedings. (*Murray v. Hoboken Land Co.*, 18 Howard 274, 285; *Boyd v. United States*, 106 U. S. 633.) The Trade Commission Act is not criminal or penal save that it makes it an offense to refuse to make reports or to testify in regard to the matters committed to the Commission's jurisdiction. None of the purposes for which the Trade Commission Act authorizes the Commission to procure this information involves any criminal or penal offense. It is authorized to report facts to Congress, make the information public at the discretion of the Commission, make recommendation to Congress for legislation, and to enforce the provisions of Section 5 of the Trade Commission Act and Sections 2, 3, 7, and 8 of the Clayton Act. Violations of the prohibitions of Section 5 of the Trade Commission Act and of the named sections of the Clayton Act do not subject any person or corporation to penalties. The limit of the Commission's power in such cases is to issue an order to cease and desist from the use of the practice. If the Fourth Amendment is to be invoked only in cases or proceedings criminal or penal in their nature, obviously it has no application here.

But if the Fourth Amendment may be invoked in other than criminal proceedings, it is clear that corporations do not enjoy the same immunity under that amendment that natural persons have; and that corporations must submit their books and papers to duly constituted authority when demand is suitably made. Demand is suitably made when a subpœna duces tecum properly specific and limited in its scope is served upon the corporation required to produce books and papers. (*Wilson v. United States*, 221 U. S. 361, 382; *Wheeler v. United States*, 226 U. S. 478; *Essgee Co. v. United States*, 262 U. S. 151.) In the *Wilson case*, *supra*, this court said, referring to the books and papers of a corporation:

They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its charter privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It can not resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably

made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress.

This passage was quoted with approval and followed by this court in *Essgee Co. v. United States*, *supra*.

Reports were required in the instant case by the Commission under express authority of law and within the provisions of the statute and the questionnaires were specific calling for particular classes of trade data. Under the decisions above quoted it is clear that if there was any search involved it was a reasonable search.

In so far as the data were for purposes of ascertaining whether the prohibitions of Section 5 of the Trade Commission Act and of Sections 2, 3, 7, and 8 of the Clayton Act were being violated, the demand was clearly an exercise of the visitorial power of the Federal Government over corporations engaged in interstate commerce. In *Hale v. Henkel*, *supra*, this court says that Congress has at least as much visitorial power over the interstate commerce of corporations as the state has over corporations of its own creation. The extent of the demand which may be made for the production and inspection of books and documents under the visitorial power of the states is shown by the decisions of this court in *Consolidated Rendering Co. v. Vermont* (207 U. S. 541) and *Hammond Packing Co. v. Arkansas* (212 U. S. 322). The requirements of the questionnaires

in the instant case were much less sweeping than the demands in these cases.

Finally, in the cases in which the protection of the Fourth Amendment has been successfully invoked by corporations, and apparently in all cases in which it has been sought to be invoked, demand was made for the production in court or before a grand jury or other tribunal of books, papers, or documents; or books, papers, or documents, or copies thereof surreptitiously seized were sought to be introduced in evidence in such proceedings against the owners thereof. In the instant case the appellees have not been required to produce any books, records, or correspondence or other documents at any place or at any time. Blank forms for reports were sent them calling for certain trade data which they were required to fill out and return to the Commission and to furnish, in addition thereto, balance sheets showing the results of their operations. The case of *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission* (221 U. S. 612) furnishes a striking analogy to the case at bar. There the Commission had required railroads subject to the provisions of the Act to Regulate Commerce to make monthly reports, under oath, showing all instances where employees, subject to the Act, had been on duty longer than 16 consecutive hours. The Hours of Service Act made it an offense, punishable by fine, for a railroad to permit any employee engaged in the transportation of persons or property in interstate commerce to remain on duty for a longer period than this except under emergency condi-

tions. It was contended by the railroad companies that to compel the disclosure called for by these reports would violate the Fourth Amendment. This court, speaking through Mr. Justice Hughes, said:

The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

If, as held in that case, compelling the disclosure of information which may subject the corporation disclosing it to penalties be not in violation of the unreasonable search and seizure clause, a fortiori, compelling the disclosure in the instant case of data which are for the information of Congress, and for publication, and which, so far as the laws which the Commission is charged with enforcing are concerned, could not subject the parties to any penalties or forfeitures, does not violate this clause of the Fourth Amendment.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia should be reversed and the case remanded with instructions to dismiss the bill and dissolve the injunction.

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APPENDIX A.

[House Report No. 533, Sixty-third Congress, Second Session.]

INTERSTATE TRADE COMMISSION.

April 14, 1914, committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Covington, from the Committee on Interstate and Foreign Commerce, submitted the following report (to accompany H. R. 15613):

1.¹ The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 15613) to create an interstate trade commission, to define its powers and duties, and for other purposes, having considered the same submits this report thereon.

2. The committee begs leave to report to the House that it has had under consideration a number of bills relating to the subject of the establishment of an interstate trade commission. It was announced when the hearings began before the committee upon this proposed legislation that the whole matter of the creation of an interstate trade commission would be considered, including any substitute bills which might be proposed or any suggested amendments to the pending bills.

3. These hearings have been very full and have concerned the varying aspects of the legislation as

¹ The paragraph numbers in this report have been inserted by counsel for convenience in references.

they appeared to business and professional men of large experience. The committee has also had available the elaborate hearings upon the subject before the Senate Committee on Interstate Commerce in 1911-12.

4. After the hearings were closed a subcommittee was named to consider the proper scope of the proposed legislation. It has labored unremittingly for some time to work out the problems involved and to present a bill adequate to meet the sentiment and requirements of the people respecting an independent administrative bureau of the Government to be concerned with industrial corporations engaged in interstate commerce. The completed work of the subcommittee was carefully considered by the full committee, and as a result all the bills originally introduced and referring to the subject of an interstate trade commission have been laid on the table, and the bill H. R. 15613, prepared by the subcommittee, is now reported back to the House with a recommendation that it pass.

5. The bill provides for an interstate trade commission in accordance with the views of the President expressed in his message to Congress in January last on the subject of trusts and monopolies. The recommendation of the President in that message was for the creation of such a commission as an instrument of information and publicity, and as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided. Moreover, he suggested in that message that the commission ought to be made capable of assisting the courts in the shaping of corrective processes. The administration idea, and the idea of business men generally, is for

the preservation of proper competitive conditions in our great interstate commerce. Consequently, the establishment of a commission having powers of regulation or control of prices, or the power directly to issue orders controlling the lawful operations of industrial business in this country, has no place in the bill now reported.

6. Under the act of February 14, 1903, the Bureau of Corporations was created as a bureau of the newly organized Department of Commerce and Labor. Under that act and its amendments the Commissioner of Corporations was given rather extensive powers to investigate the organization and management of business corporations and to obtain such information as would enable the President to make recommendations to Congress for new legislation. With the creation of the Department of Labor, in 1913, the bureau was one of those placed under the jurisdiction of the Department of Commerce. While the powers, authority, and duties conferred upon the Bureau of Corporations and the Commissioner of Corporations are broad, there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce. The act also omitted to confer other powers, perhaps not then thought useful, but now believed to be most necessary to assist in effectuating the definite policy and functions for the proposed commission announced by the President in his trust message.

7. The bill as reported provides for a commission of three members, at a salary of \$10,000 a year. The proposed commission will largely justify its creation by the method and manner of the performance

of its varied duties by its members. The highly efficient services of men of large capacity will be required, and the salaries of the members of the commission have been placed at a figure which will enable the President to secure that sort of men. In the detailed organization of the commission the provisions of the existing act to regulate commerce (and the amendments thereto) creating the Interstate Commerce Commission are followed wherever practicable.

8. In section 3 the bill transfers to the commission all of the powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations. The broadest powers of that bureau and of the Commissioner of Corporations are embraced in the general provision of the law creating that bureau to investigate the organization, conduct, and management of the business of corporations and to gather information and data to enable the President to make recommendations to Congress for legislation for the regulation of interstate commerce.

9. The Commissioner of Corporations up to this time has not come to an issue in court with any corporation concerning the extent of the powers to be exercised under the very general phraseology of the law creating the Bureau of Corporations. At the same time, in the case of *United States v. Armour & Co.* (142 Fed. Rep. 808), before Judge Humphrey in the United States district court for the northern district of Illinois, the validity of those powers was expressly in issue in a criminal case. It was held that "the primary purpose of the act was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be

found necessary, and the act must be construed in view of that purpose," and that its provisions were definite expressions of legislative intent and constitutionally enforceable.

10. In view of the judicial determination of the validity of the powers of the Bureau of Corporations and of the Commissioner of Corporations and their broad character, the bill transfers those powers to the commission by specific reference to the existing law.

11. But the great value to the American people of the Interstate Commerce Commission has been largely because of its independent power and authority. The dignity of the proposed commission and the respect in which its performance of its duties will be held by the people will also be largely because of its independent power and authority. Therefore the bill removes entirely from the control of the President and the Secretary of Commerce the investigations conducted and the information acquired by the Commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations. All such investigations may hereafter be made upon the initiative of the commission, within constitutional limitations, and the information obtained may be made public entirely at the discretion of the commission.

12. There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them.

13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial condition, and general business conduct of those concerns.

14. The testimony before the committee by many men of large business experience was singularly in accord with the idea that these reports will afford one of the surest means of that publicity which will tend to an elevated business standard and a better business stability. All corporations engaged in interstate commerce having a capital of more than \$5,000,000 are required to file these reports. But it is not always the large corporation that has an organization or financial condition or a system of practices that requires publicity to bring about lawful methods in its business. It is quite possible that a group of small corporations may be so operated as to cause serious violations of law. The commission is given the power, therefore, to make classifications of corporations having a capital of less than \$5,000,000 which shall be required to make the same annual reports that are to be made by the large corporations. This power of classification will relieve the mass of smaller business concerns engaged in interstate commerce from the necessity of making such reports, while it reserves to the commission that discretion which it ought to have to provide for rational publicity of bad practices in interstate commerce without regard to the size of the corporations engaged in those practices.

15. The commission, under this section, may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a

corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary.

16. Compulsory publicity of an abstract of the annual and special report of each corporation is required by the provision of section 17 that such abstract must be included in the published annual report of the commission. The section contains, however, ample safeguards to prevent the disclosure of those necessary trade secrets which are of no value to the public in promoting lawful competitive business, but which when disclosed simply afford an opportunity for injurious use by competitors.

17. In some quarters these annual and special reports seem to be regarded as an unnecessary publicity of the affairs of corporations. It is therefore well to note that both the preliminary and final reports of the industrial commission recommended as the chief measures of reform to check the growth of monopoly greater publicity regarding the operations of corporations and particularly the establishment of some organ of publicity in the Federal Government.

18. The preliminary report of the industrial commission submitted to Congress in 1900 said in part as follows:

"The larger corporations—the so-called trusts—should be required to publish annually a properly audited report showing in reasonable detail their assets and liabilities, with profit and loss, such reports and audit under oath to be subject to Government inspection. The purpose of such publicity is to encourage competition when profits become ex-

cessive, thus protecting consumers against too high prices and to guard the interests of employees by a knowledge of the financial condition of the business in which they are employed."

19. The final report of the Industrial Commission, submitted to Congress in 1902, in volume 19, pages 650-651, said in part as follows:

"That there be created in the Treasury Department a permanent bureau the duties of which shall be to register all State corporations engaged in interstate or foreign commerce; to secure from such corporations all reports needed to enable the Government to levy a franchise tax with certainty and justice, and to collect the same; to make such inspection and examination of the business and accounts of such corporations as will guarantee the completeness and accuracy of the information needed to ascertain whether such corporations are observing the conditions prescribed in the act and to enforce penalties against delinquents; and to collate and publish information regarding such combinations and the industries in which they may be engaged, so as to furnish to the Congress proper information for possible future legislation.

"The publicity secured by the governmental agency should be such as will prevent the deception of the public through secrecy in the organization and management of industrial combinations or through false information. Such agency would also have at its command the best sources of information regarding special privileges or discriminations, of whatever nature, by which industrial combinations secure monopoly or become dangerous to the public welfare. It is probable that the provisions herein recommended will be sufficient to remove most of the

abuses which have arisen in connection with industrial combinations. The remedies suggested may be employed with little or no danger to industrial prosperity and with the certainty of securing information which should enable the Congress to protect the public by further legislation if necessary."

20. The commission will also be required under section 10 of the bill, by the direction of the President, the Attorney General, or either House of Congress, to investigate and report the facts relative to any alleged violation of the antitrust acts, and it may include in its report recommendations for readjustment of business, so that the corporations investigated may operate lawfully.

21. Attorney General Harmon, in reply to a House resolution of January 7, 1896, requesting a report regarding the enforcement of the laws against trusts and conspiracies in restraint of trade, and what further legislation, if any, was needed, in part said:

"If the Department of Justice is expected to conduct investigations of alleged violations of the present law or of the law as it may be amended it must be provided with a liberal appropriation and a force properly selected and organized. * * * But I respectfully submit that the general policy which has hitherto been pursued of confining this department very closely to court work is a wise one, and that the duty of detecting offenses and furnishing evidence thereof should be committed to some other department or bureau."

22. Moreover, the Department of Justice has often found that an agreement for readjustment by an offending corporation accomplishes a better result than the continuance of a prosecution. Heretofore there has been no administrative body to obtain the

information that will assist in attaining such an end, and in connection with this power now conferred the commission has a most desirable independence preserved by giving it the entire control of its report to be made after such investigation. There can thus be no laxity at the Department of Justice when it is presented with the facts disclosing violations of law.

23. Broad as are the powers of the Bureau of Corporations, the Commissioner of Corporations in his report of 1904 (p. 14) defines the limit of those powers. He says:

"He can not make investigations or procure or furnish information by means of his compulsory powers for the purpose of enforcing penal provisions other than those contained in the organic act of the bureau."

24. Having regard for the report of Attorney General Harmon, above quoted, the power of investigation conferred upon the commission by section 10 is an extremely important and efficacious one, and one not now exercised by any independent bureau of the Government. That it is a constitutional delegation of power seems certain. By section 3 of Article II of the Constitution it is specifically required of the President that "he shall take care that the laws be faithfully executed." The Attorney General is merely an arm of the Executive, and it was no doubt in consonance with this constitutional provision that Attorney General Harmon wrote the report to Congress above referred to. It is thus certain that the investigations by the commission under this section, by direction of either the President or the Attorney General, will be in the exercise of valid power, delegated to the commission.

25. In so far as the investigations under this section as the result of resolutions of Congress, or either House thereof, are concerned, the commission is authorized to perform a legal and certainly a most beneficent function. Congress, having the constitutional authority to legislate in regard to interstate and foreign commerce, has the power to obtain all the information necessary to make such legislation appropriate and adequate. Its future regulation of industrial corporations engaged in interstate and foreign commerce may be as much determined by information concerning the present practices of corporations in violation of law as otherwise. In its judgment the existing substantive law or procedure of the courts may be ineffective and new remedial legislation may be the solution. In repeated cases the Supreme Court has held that "Congress may not delegate its purely legislative power to a commission," but it has not been held that Congress may not by a commission elicit information in order to lay the foundation for intelligent and effective action in the matter of regulating interstate and foreign commerce.

26. Unthinking criticism has been directed against such power to be conferred on the commission. However, more than 25 years ago Judge Cooley, the distinguished chairman of the Interstate Commerce Commission, said of such power then believed to exist in that commission:

"This is a very important provision, and the commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist and which is not likely to be

brought to its attention on complaint by a private prosecutor."

27. Section 12 confers upon the commission a broad and most useful power as an aid to the courts in suits arising under the antitrust laws. There has been no proper bureau equipped with a trained force to assist the Department of Justice and the courts in solving the difficult economic problems connected with the dissolution of corporations which have been adjudged to be operating in violation of the antitrust laws, and one of the most effective powers conferred upon the interstate trade commission is that contained in the section authorizing the courts to refer to it the matters of the pending suit at the conclusion of the testimony therein to ascertain and report an appropriate form of decree. The purpose of such investigation is to give the court the completest economic information to assist it. This power, of course, does not authorize the commission to gather evidence to be offered in any case considered by the court as the basis of its judgment, and it amply safeguards the constitutional rights of defendants by reserving to them the same right to file exception to the report that now exists in relation to master's reports in equity causes in the Federal courts. The commission, as an independent body of specialists, will, however, have placed upon it the proper burden of framing the plans for the effective segregation and readjustment of unlawful combinations, subject, of course, to the approval of the court.

28. The commission is required, upon its own initiative, by section 13 to see that the execution of any decree against any corporation to prevent or restrain a violation of the antitrust acts is effective. It has been repeatedly said by authorities upon this sub-

ject that there must be some independent and impartial body charged with the duty to see to the continued performance, subject to the direction of the court, of such decrees. The commission is to make investigations whenever necessary for the purpose of enforcing that effective disintegration of a combination in restraint of trade contemplated by the decree of court, and it must transmit to the Attorney General a report showing the manner in which the decree is being carried out, so that application may be made at once to the court for any supplemental order necessary to the proper and continued enforcement of its decree.

29. The power of the Interstate Commerce Commission respecting the compulsory attendance and testimony of witnesses and the production of books and papers has been held in one case to be limited to the quasi judicial duties of the commission to hear complaints against common carriers for violation of the "act to regulate commerce," or to make investigations by the commission upon matters that might have been the object of complaint. (*Harriman v. Interstate Commerce Commission*, 211 U. S., p. 243.) In order that the commission may have ample power of subpœna and production of books and papers, the language of section 16 of the bill has been expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken.

30. In the Industrial Railways case, Interstate Commerce Commission Report No. 4181, an inquiry into allowances by trunk lines to show lines of railroads serving industries, the report says (p. 267):

"These matters were voluntarily brought to our attention by a joint committee of the trunk lines and

the Steel Corporation and were submitted for our consideration on the understanding that the conclusions reached would be accepted both by the carriers and the industries."

31. The powers of investigation conferred upon the commission in the reported bill are certainly broader than are those of the Interstate Commerce Commission, and, considering the specific power under section 10 to include in any report made thereunder "recommendations for readjustment of business in accordance with law," business men may obtain that measure of definite guidance and information which is proper to be given by an administrative body.

32. During the consideration of the bill by the subcommittee there was much discussion as to the extent to which the provision of the Constitution contained in the fifth amendment, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," might be invoked to protect corporations from an examination of their books and papers. Taking the cases of *Interstate Commerce Commission v. Brimson* (154 U. S. 457) and *Hall v. Henkel* (201 U. S. 43) as the rule of law, and observing the broad application of that rule in the case of *United States v. Armour & Co.* (142 Fed. Rep. 808), there would seem no doubt that there is ample authority for the constitutional exercise of the full powers of investigation conferred upon the commission.

33. The commission has in no sense been empowered to make terms with monopoly or in any way to assume control of business. Such matters are of a most delicate, complex, and doubtful nature, and their advocates seemed all too desirous that the Government should make itself initially responsible

for corporate activities conceived perhaps with such subtlety that the dangers to the public might develop only after sad experience. There has been no attempt to deal with the question of maintenance of fixed prices. The commission has been given no power to pass orders in any way regulating production. It has not been clothed with authority to make a declaration as to the innocuousness of any particular corporation or agreement, even if coupled with the right to revoke such order in the future.

34. All those problems are interwoven with the industrial business of the country in such a way as to be effectively legislated upon, if at all, only after the most exhaustive investigation by trained experts. The hearings before the Senate Committee on Interstate Commerce of a year and a half ago and the hearings before this committee during the pendency of the present bill did not produce any information which would warrant an attempt at an intelligent and sound legislation upon them.

35. It must be remembered that this commission enters a new field of governmental activity. The history of the Interstate Commerce Commission is conclusive evidence that the best legislation regarding many of the problems to come before the interstate trade commission will be produced from time to time as the result of the reports of the commission after exhaustive inquiries and investigations. No one can foretell the extent to which the complex interstate business of a great country like the United States may require, alike for the benefit of the business man and for the protection of the public, new legislation in the form of Federal regulations, but such legislation should come by a sound process of evolution. Even the control of the railways in this

country by the Interstate Commerce Commission affords no complete parallel to administrative control of the industrial corporations of the country by a Federal commission. It is largely the experience of the independent commission itself that will afford Congress the accurate information necessary to give to the country from time to time the additional legislation which may be needed.

36. The whole theory of the creation of the commission has been to make it an efficient and useful independent body, concerned with the maintenance of proper supervisory relations of the Federal Government over industrial corporations engaged in interstate commerce.

37. Those facts which ought to be the common property and the common knowledge of American business men are for the first time to be gathered and controlled as to their publicity by an independent commission. Powers of investigation, safeguarded by proper constitutional limitations, are taken from a now subordinate department under the control of the Executive and given to this nonpartisan body. Where publicity through reports and investigations to promote beneficent legislation are alike ineffective to develop better business practices, the existing administrative machinery of the Federal law is fortified by an independent commission which will perform a work in aid of the courts not now authorized anywhere in the Government.

38. Having regard for the singular success which the Interstate Commerce Commission has had upon the relation of the railroads to the public, independently of the direct power it has exercised to regulate rates and practices, it would seem that the country may rightfully feel that the interstate trade

commission will perform services that will be of inestimable advantage to the business and the future of the country.

VIEWS OF THE MINORITY.

The Republican members of the Committee on Interstate and Foreign Commerce desire to separately express their general concurrence in the provisions of H. R. 15613 as reported to the House.

For many years all legislation in this committee has been considered upon its merits, without regard to partisan lines or influences. The subject matter of this bill was recommended to Congress by the President and has been properly made a matter of importance by the present administration. The Republican members on the committee realized the great interest in it by the business organizations and thoughtful citizens interested in the public welfare, as well as its consequence and opportunity for good to the people of the country. Thus its consideration has proceeded with a sincere desire on our part to assist in the preparation of the legislation along the lines which would seem to meet both the public expectations and necessities and yet not be oppressive so as to injure individual effort and initiative.

The majority members of the committee have freely conferred with the members of the minority and have received their cordial cooperation in the formation of this measure. The legislation as reported is such in general as we approve, although individual differences necessarily exist as to the wisdom and scope of some of its provisions and details.

This measure follows substantially the declaration of the last platform of the Republican national convention as follows:

FEDERAL TRADE COMMISSION.

In the enforcement and administration of Federal laws governing interstate commerce and enterprises impressed with a public use engaged therein there is much that may be committed to a Federal trade commission, thus placing in the hands of an administrative board many of the functions now necessarily exercised by the courts. This will promote promptness in the administration of the laws and avoid delays and technicalities incident to court procedure.

In some respects this bill has not the scope outlined in the platform in conferring administrative powers over some classes of business. But we feel that such should be gradually evolved and assumed after more extensive experience and discussion.

The reported measure does not transfer to the commission any function now exercised by the courts but will be of assistance to the courts in the enforcement of the laws regulating commerce.

The measure contains no changes of substantive law as to antitrust matters, because under the rules of the House such legislation is referred to another committee of the House.

F. C. STEVENS

JOHN J. ESCH

J. R. KNOWLAND

E. L. HAMILTON

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INDEX

PREVIOUS OPINIONS IN PRESENT CASE.....	Page 1
GROUND OF JURISDICTION.....	1
STATEMENT.....	2
NATURE OF INFORMATION DEMANDED BY COMMISSION.....	3
SPECIFICATION OF ERRORS TO BE URGED.....	7
ARGUMENT.....	7-33

SUMMARY

I. Congress has power to require these corporations, engaged in interstate commerce, to furnish complete information respecting their interstate business.....	9
II. As an incident to the exercise of the above power, information may be required respecting their business not interstate commerce, where (1) the accounts are commingled, or (2) the matters have a direct bearing on their interstate business.....	17
III. The Federal Trade Commission Act authorizes the Commission to require the reports called for in this case....	21
IV. Conclusion.....	32
APPENDIX A: Act creating the Federal Trade Commission, approved September 26, 1914, Chap. 311 (38 Stat., pages 717 et seq.).....	34
APPENDIX B: Deficiency Appropriation Act approved November 4, 1919, to supply deficiencies in appropriations for the fiscal year ending June 30, 1920, and prior fiscal years, Chap. 93 (41 Stat., pages 327 et seq.).....	49

CASES CITED

<i>Amos v. United States</i> , 255 U. S. 313.....	12
<i>Federal Trade Commission v. Baltimore Grain Co.</i> , 284 Fed. 886.....	25
<i>Gould v. United States</i> , 255 U. S. 298.....	12
<i>Hale v. Henkel</i> , 201 U. S. 43.....	12, 13
<i>Harriman v. Interstate Commerce Commission</i> , 211 U. S. 407..	24, 25
<i>Interstate Commerce Commission v. Brinson</i> , 154 U. S. 447..	10
<i>Interstate Commerce Commission v. Goodrich Transit Co.</i> , 224 U. S. 194.....	18, 25
<i>Kilbourn v. Thompson</i> , 103 U. S. 168.....	13
<i>Munn v. Illinois</i> , 94 U. S. 113.....	16
<i>Silverthorne Lumber Co. v. United States</i> , 251 U. S. 385.....	12
<i>Terminal Taricab Co. v. District of Columbia</i> , 241 U. S. 252..	19, 20
<i>United States v. Armour & Co.</i> , 142 Fed. 808.....	27-29

II

STATUTES CITED

Constitution of the United States:	Page
Fourth Amendment-----	11
Fifth Amendment-----	11
Judicial Code, Sec. 250-----	2
Act of February 14, 1903, Chap. 552 (32 Stat., pp. 825, 828)-----	27
Act of September 26, 1914, Chap. 311 (38 Stat., pp. 717, 721, 722)-----	7, 22, 23
Act of November 4, 1919, Chap. 93 (41 Stat., pp. 327, 328)-----	23

CONGRESSIONAL DOCUMENTS CITED

Cong. Rec., 63d Cong., 2d Sess., Vol. 51, pt. 9, p. 8848-----	31
Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess-----	29-31

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 4

FEDERAL TRADE COMMISSION ET AL., APPELLANTS

v.

CLAIRE FURNACE COMPANY ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT
OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLANTS ON REARGUMENT

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of the District of Columbia in this case, filed April 19, 1920, was not officially reported. It will be found in the record. (R. 100.)

The opinion of the Court of Appeals of the District of Columbia is reported in 285 Fed. 936 and 52 App. D. C. 202. (See R. 115.)

GROUND OF JURISDICTION

The action was brought to restrain the Federal Trade Commission from taking steps to compel the complainant corporations to file monthly reports of their business. (R. 2-11.)

(1)

The Commission interposed an amended answer (R. 77-89), and the complainants joined in a motion to strike it out on the ground that it did not state a defense (R. 94), which motion was granted, and thereupon final decree was entered March 10, 1922, against the defendants (R. 97), from which appeal was taken to the Court of Appeals of the District of Columbia (R. 100), which affirmed the decree on January 2, 1923 (R. 126).

An appeal to this Court was allowed March 17, 1923 (R. 128) under Section 250 of the Judicial Code. The courts below held that the Commission had no power to require the information it demanded.

STATEMENT

This case presents the question whether the Federal Trade Commission has power to require certain corporations engaged in interstate commerce to file with the Commission periodical statements of their financial operations and reports of their business.

The case was argued in December, 1923, and a reargument ordered by the Court. The brief for the United States used on the original argument covers the field, and no attempt will be made in this brief to restate the entire case or do more than emphasize some points and rearrange some of the material.

It is proposed (1) to make clear just what information the Commission has asked for, (2) to consider if Congress has power to require the information to be furnished, and (3) to ascertain whether Congress has authorized the Commission to demand the information.

Complainants joined in a motion to strike out the answer of the Commission on the ground that it did not state a defense. (R. 89-95.) The motion was granted and final decree thereupon entered for the complainants. (R. 97.) As separate motions to strike out the answer were not made by the several complainants, the action of the court in striking out the answer can not be sustained unless *all* of the complainants are in a situation entitling them to relief, and the power of the Commission to require the information must be tested by reference to the situation of that complainant which has least ground for resistance to the Commission's demand.

THE NATURE OF THE INFORMATION DEMANDED BY THE COMMISSION

The corporations from which information was asked are all engaged in selling iron, steel products, or coke in interstate commerce. They also make sales of such merchandise in intrastate commerce, and they are also engaged in lines of business which are not commerce, in that they manufacture or produce the merchandise which they sell in interstate and intrastate commerce,

instead of purchasing such merchandise from other manufacturers or producers. It is admitted in the complaint that some corporations sell as much as seventy-five to eighty per cent of their products in interstate commerce. (R. 6, 7.) The answer alleged that all but three of them sold sixty-five per cent or more of their products in interstate commerce. (R. 79.) Some of them, such as the Bethlehem Steel Company and the Inland Steel Company, may sell more than eighty per cent of their output in interstate commerce, as the complaint goes no further than to allege that they sell a "portion" of their products in the States where they produce or manufacture them. (R. 7.)

Enough is said of their operations in the pleadings to indicate that these corporations are engaged in basic industries of the utmost importance in the industrial life of the Nation; that they do business on a very large scale; represent very large aggregations of capital, and it is fair to infer that the veil of privacy has already been lifted from their affairs to the extent usual in modern times for corporations of that class.

It was alleged in the answer that much of the information called for by the Commission is regularly disseminated through their trade publications and trade associations. (R. 81.) It was also alleged that the intrastate activities of the complainants are so interwoven with their interstate

business that it is impossible to separate them, and that even if they could be separated such separation would render the results inaccurate and of little value in enabling the Commission to perform its duties. (R. 86.) It is a fair inference that the accounts reflecting the operations of each of these companies in interstate and intrastate commerce, and in business which is not commerce at all, are more or less commingled, and that various expenses require allocation or apportionment between operations which are interstate and those which are not.

The Commission asked for monthly reports to be filled out by the corporations on forms furnished by the Commission. These forms called for balance sheets giving a complete statement of assets and liabilities (R. 32, 33), monthly income statements (R. 29-31) showing profits and such details as depreciation, general administrative expenses, and selling expenses (R. 28), a statement of orders booked during the month and unfilled at the end of the month (R. 27), statement of plant capacity (R. 26) and quantity produced (R. 15, 16), sales prices (R. 20-22), both domestic and export, and monthly statements of cost of production (R. 18, 19). The forms did not limit the requirements of the Commission to the interstate-commerce business of the complainants, and no segregation was asked for. The information called for relates to merchandise sold in interstate and in-

trastate commerce and the cost of manufacture or production. Much of the information relates to financial operations usually reflected in books of account, but part of it—such as plant capacity—is not information ordinarily the subject of accounting entries.

It was stipulated (R. 97) that the making of these reports involved no unreasonable outlay or expense to the corporations.

The forms were for general use, and it is not to be supposed that each of the complainants deals in all of the articles mentioned in the reports. *The information asked for is information which any well organized corporation with a modern system of accounting should be able to furnish on a moment's notice from accounts and records regularly kept for its own use.*

The inquiry by the Commission originated from the fact that the attention of Congress was directed to high prices prevailing for certain basic commodities, such as foodstuffs, fuel, textiles, leather, and steel and iron, and the House of Representatives, seeking the cause, called before one of its committees members of the Federal Trade Commission, who recommended inquiry into the conditions affecting costs and prices of these commodities, and Congress appropriated money for that purpose, with the idea that the information obtained might disclose influences affecting interstate commerce and form the basis for additional

legislation, or enable the Commission to take some action, or relieve the situation through publicity.

SPECIFICATION OF ERRORS TO BE URGED

The assigned errors to be urged are that the court below erred—

1. In holding that the amended answer did not state a defense.
2. In holding that Congress had no power to require these corporations to file the reports demanded by the Commission.
3. In holding that the Act of September 26, 1914, Chapter 311, 38 Stat. p. 717, known as the Federal Trade Commission Act, did not authorize the Commission to require the filing of the reports.
4. In affirming the judgment permanently enjoining the Commission from enforcing the demand for the reports.

ARGUMENT

Summary

I. Obtaining information about their interstate business from corporations engaged in interstate commerce is an appropriate means of enabling Congress to regulate interstate commerce.

II. The power to require such corporations to furnish information concerning their affairs can not be denied unless there be some specific provision of the Constitution restraining its exercise.

III. The ultimate question in this case is whether the power is restrained by the Fourth Amendment, prohibiting unreasonable searches and seizures.

IV. It is not an unreasonable invasion of privacy to require from these corporations reports of their interstate business, although the information is not for use

in any pending proceeding or in connection with pending legislation.

V. Having power to require information respecting their interstate commerce business, Congress has power to require information respecting the business of these corporations not interstate commerce, where (1) the accounts are commingled or (2) their other operations have a direct bearing on their activities in interstate commerce.

VI. The Commission is given power by the terms of the Federal Trade Commission Act to require reports in the form demanded.

The main questions are, first, whether Congress has power to require this information to be furnished, and, second, whether the Federal Trade Commission has been authorized to call for it. We contend:

First, that Congress has power to require corporations of the kind here involved, engaged in interstate commerce, to furnish periodical reports giving complete information with respect to their operations in interstate commerce, where, as in this case, the information is reasonable in extent and the furnishing of it involves no unreasonable expense or interference with business, and the information so obtained may form the basis for legislation, or for recommendations by the Commission to Congress for legislation, regulating interstate commerce, or may enable the Commission to determine whether practices exist which it is given power to deal with, and that the power of Congress to require corporations engaged in interstate commerce to furnish information re-

specting their affairs is not limited to situations where a pending complaint of misconduct or breach of law is being investigated, or where particular legislation is imminent and Congress has its attention focused in a concrete way upon the subject.

Second, if Congress has power to require from corporations engaged in interstate commerce reasonably complete information respecting their interstate business in the form of periodical reports, it has power to require similar information with respect to their activities other than those in interstate commerce where (1) the accounts of their different operations are commingled or (2) such other operations have a direct bearing upon their activities in interstate commerce.

I

The power to require information respecting interstate commerce

The power of Congress to regulate commerce "acknowledges no limitations other than prescribed by the Constitution." Congress has power to make all laws which may be necessary and proper in carrying into execution its power to regulate commerce. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Obtaining, at first hand, from corporations engaged in interstate commerce information respecting their affairs and the manner in which that commerce is conducted is plainly an appropriate means of enabling Congress to properly exercise its power to regulate interstate commerce, and such a power can not be denied unless there is some specific provision of the Constitution restraining its exercise. To provide by law for the organization of commissions such as the Federal Trade Commission, to obtain information of this kind, analyze it, and submit recommendations to Congress with respect to legislation, or use the information to enable the Commission to discharge other duties imposed by law, is an appropriate means of exercising the power to regulate interstate commerce.

All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce can not be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules. [*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 474.]

The best way of obtaining accurate information about a business is to obtain it at first hand from those engaged in it.

Where, then, is the specific constitutional provision restraining the exercise of this power?

The provisions of the Fifth Amendment preventing extraction of incriminating evidence have no application here because corporations are not within its protection.

The provisions of the Fifth Amendment relating to taking property without due process of law are not violated in a case such as the present, where there is no undue expense imposed and no trade secrets are being taken or exposed.

The only constitutional provision bearing on the case, and the one which is chiefly relied on by the appellees, is the Fourth Amendment, providing that—

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated * * *.

The so-called right of privacy—that is, the right to hold private books of account and documents free from the scrutiny of strangers—depends for its protection on the above provision in the Fourth Amendment. Not all searches and seizures are forbidden by it, but only those that are unreasonable.

The ultimate question in this case, therefore, is whether there is an *unreasonable* invasion of pri-

vacy in asking corporations of the kind here involved, engaged in the business of the character they are engaged in, to make periodical reports giving reasonably complete information respecting their operations.

The right of privacy is not an absolute one, and must give way wherever the public interest reasonably requires it. The question of reasonableness may depend on the manner in which the information is obtained, or on the nature of the information sought, or the purpose to which it is to be applied.

The constitutional provision against unreasonable searches and seizures may be violated by obtaining information in a secret or intrusive manner accompanied by force.

Silverthorne Lumber Co. v. United States,
251 U. S. 385.

Gouled v. United States, 255 U. S. 298.

Amos v. United States, 255 U. S. 313.

The provision may also be violated where the demand for information is beyond reasonable limits in the extent to which it pries into a person's affairs. Such is a case where all books, papers, confidential correspondence, and documents belonging to a corporation are demanded without regard to their materiality or with the result of unduly hampering the business of the person from whom the information is demanded or imposing upon him unreasonable expense. *Hale v. Henkel*,

201 U. S. 43. There may also arise the question whether the nature of the information is such as to make it reasonably required in the public interest. Such was the *Kilbourn* case, 103 U. S. 168, where a committee of the House of Representatives demanded information and evidence with respect to a matter on which Congress had no power to legislate, and where the investigation "could result in no valid legislation," and where it was only a fruitless and intrusive investigation into private affairs.

In the present case the main contention advanced by the appellees is that Congress has not the power to require corporations engaged in interstate commerce to file periodical reports of their interstate business, because the information is not for use in any pending legal proceeding involving a specific charge of violation of law, nor for immediate use in connection with some concrete proposal for legislation pending in Congress.

It seems to be settled that Congress has power to require from a corporation information respecting its affairs where a specific charge or complaint is made of violation of law which is the subject of a pending investigation. It also seems to be settled that Congress or either House may, through committees, make investigation and require information as an aid in considering specific legislation on which Congress has focused its attention, where the matter is one which Congress has power to deal with. The contention of the

appellees is that it amounts to an unreasonable search and an unreasonable invasion of privacy for Congress, through a commission, to require the filing of periodical reports of corporations engaged in interstate commerce, the information so obtained to be used as a basis for recommendations to Congress for additional legislation or for enabling the commission to determine whether there are conditions existing which require more specific investigation. That the demand for these reports does not involve unreasonable search is shown by the following considerations:

1. While corporations are under the protection of the Fourth Amendment, the test of reasonableness may not be the same as in the case of individuals. Under modern conditions the veil of secrecy has already been largely lifted from the affairs of corporations, especially of the type here involved. Corporations are subject to complete visitorial powers of the States which charter them, and are generally required by the laws of such States to file periodical reports for public inspection. Corporations having vast capital and engaged in large enterprises usually have large numbers of stockholders entitled to periodical reports on the business, and the making of such reports to the stockholders broadcasts information respecting their affairs. Corporations having their stocks listed on stock exchanges for the information of investors file and publish very com-

plete information respecting their affairs. The old idea of secrecy among competitors has disappeared, and the modern idea is to exchange information; and the information called for here is largely of the statistical type which modern trade associations exchange among their members and claim the right to exchange, contending that such exchange is in the mutual interest of those engaged in the industry. A considerable part of the information called for in these reports could be obtained, if Congress authorized it, from reports filed with the Commissioner of Internal Revenue. All these considerations tend to show that the reports here demanded in this case involve a very slight invasion of privacy.

2. There is no inquisitive prying into the affairs of the corporations, no demand for unlimited examination of their private papers, and no "fishing expedition," but a specific statement of what is required.

3. There is no hampering of business, no substantial expense, and the information called for is that which any corporation with a modern system of accounting should be able to furnish readily from existing records.

4. The manner of requiring the information is reasonable and does not involve force, or stealth, or physical seizures.

5. The nature of the business of these corporations is a factor in the case. They are engaged in

basic industries. It is not contended that their business is of such a nature as to make those engaged in it subject to regulation under the principles announced in *Munn v. Illinois* (94 U. S. 113) and later cases. It is believed, however, that the nature of the business and the intense effect the manner of its conduct has upon the commercial life of the Nation is a factor bearing on the question whether the inquiry involves an "unreasonable" search, and which justifies a greater inquisitiveness than might be allowed as to businesses having a less direct bearing on the general welfare.

6. While in the end the question of reasonableness under the Fourth Amendment is a judicial one, some latitude must be allowed to Congress to determine how far it is necessary to invade privacy.

7. Finally, there is presented here the question whether Congress is to be limited to obtaining information through committees or commissions specially appointed from time to time to obtain information for use in pending matters, or whether it may adopt the modern and more scientific method of creating permanent commissions with authority to require periodical reports from corporations engaged in a business subject to congressional regulation, such information to be obtained by experts who are more likely to ask for necessary and useful information without partisan spirit and are less likely to bring out matters

which ought to be kept private than a temporary committee attempting the same work.

If Congress has power to require corporations engaged in interstate commerce to furnish complete information respecting their interstate business when the information is called for by a congressional committee for aid in considering some form of concrete legislation under immediate consideration, it is difficult to see why the power does not extend to obtaining that information through a permanent commission where there may not be a concrete measure pending in Congress and the information is sought for to point out the necessity for legislation or the necessity for refraining from it. To make the test of the existence of the power, or the want of it, the extent to which the attention of Congress may be directed upon specific proposed legislation involves principles too vague to establish a dividing line.

II

The power to require information respecting business not interstate

If it be determined that Congress has power to require reports from corporations engaged in interstate commerce, giving complete information with respect to their transactions in interstate commerce, it follows, as an incident to such power, that information may be required *from the same corporations* with respect to intrastate commerce or transactions not commerce at all, where (1) the

accounts of the two classes of business are commingled, or (2) the information has a direct bearing on the interstate commerce. The *Goodrich Transit Company* case (224 U. S. 194) may not be decisive in this case of the power to require periodical reports from corporations engaged in interstate commerce, because it dealt with the case of a public-service corporation, and to that extent presented a factor which does not exist in the present case, but it does plainly settle the proposition that if reports may be required as to interstate business they may cover intrastate business done by the same corporation. It was pointed out that accounts kept by a corporation doing both interstate and intrastate business could not be analyzed unless the reports covered both. The Court said it is proper to know "whether charges of expense are made against one part of a business which ought to be made against another" (page 216), and "how would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense" (page 213).

If in the present case these corporations had been asked to furnish statements respecting only their interstate business separate from their other transactions, the attempt at separation would have involved allocation of some items of expense and

apportionment of others, a verification of which would involve an examination of all the figures.

The case of *Terminal Taxicab Company v. District of Columbia* (241 U. S. 252), cited by the appellees, seems at first glance to sustain the proposition that if a corporation is in two kinds of business, one subject to regulation and the other not, the public authorities may demand information from it concerning only that branch of its business which is subject to regulation. That was a suit to restrain the Public Utilities Commission of the District from exercising jurisdiction over a cab company, part of whose business was that of a public service company and part of whose business was not, being the renting of cars to private individuals. An order of the Commission required the company to file reports giving schedules of its rates for all its business. The Court held that this information need not be furnished with respect to the renting part of the business, and said (page 256):

There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in *Int. Comm. Comm. v. Goodrich Transit Co.*, 224 U. S. 194, 211.

An examination of the *Terminal Taxicab Company* case shows that the order of the Public Utilities Commission required only the filing of the schedule of rates in force. It did not call for any

other accounts, or for any information respecting expense or profits, and consequently no showing was made that there was any commingling of accounts or that the information called for involved the analysis of figures relating to all of the company's business or any allocation or apportionment of expense. On this ground the *Taxicab Case* is clearly distinguishable from the present case.

With respect to the demand for information as to the cost of production of merchandise sold by these corporations in interstate or intrastate commerce, it seems clear that if Congress has power to ask for reports of their interstate business it may require complete information, and among the items of information which may be asked for is information with respect to prices charged and profits made in interstate commerce. Though Congress may not fix prices and thus regulate the profits of these companies, it does not follow that Congress may not be entitled to obtain information with respect to profits. The public is vitally interested in the prices and profits of these concerns, and the principal object of legislation affecting combinations in restraint of trade and regulating interstate commerce is because of the effect on prices, and information respecting prices charged and profits made in interstate commerce is of vital importance in dealing with commerce. If it once be conceded that Congress has power to ascertain from these companies what profits they

are making in interstate commerce, then it necessarily follows that it may learn about their costs. If all the merchandise these companies sold in interstate commerce were purchased by them, their costs would be represented by the prices they paid, but where, as in this instance, they manufacture what they sell in interstate commerce, it is difficult to see how the profits made in interstate commerce may be arrived at without some information as to the cost of manufacture.

Plant capacity, production, and unfilled orders are not matters of accounting or subject to the argument relating to commingling of accounts, but have a very direct bearing on the interstate commerce conducted by these corporations. If they were found to be making large profits and if their plants were partly idle, influences affecting interstate commerce requiring action or legislation would be indicated. If, on the other hand, high prices and large profits were accompanied by figures showing that production equaled plant capacity and unfilled orders at the end of each month were increasing, it would merely show that demand was outrunning supply.

III

Construction of the Federal Trade Commission Act

The contention that the Act does not give authority to the Commission to require reports from corporations engaged in interstate commerce where

there is no pending charge of misconduct or violation of law, and the only purpose is to obtain statistical information useful in pointing out needful legislation or enabling the Commission to see whether particular investigation may be needed, is untenable. The terms of the Act and its legislative history point irresistibly to the other conclusion.

Section 6 provides that the Commission shall *also* have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce * * *.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission, in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing * * *.

* * * * *

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use. [Chap. 311, 38 Stat., pp. 717, 721, 722.]

These provisions are clear and set forth independent powers and duties which have no necessary relation to pending proceedings to investigate complaints of unfair methods of competition, dealt with in other sections of the Act. Indeed, the requirement of *annual* reports is utterly inconsistent with the idea that the information which may be asked for is only for use in connection with some particular pending investigation.

The Deficiency Appropriation Act approved November 4, 1919 (Chap. 93, 41 Stat. 327, 328), may not have added anything to the powers of the Federal Trade Commission, because it expressly provides for expenditures "within the scope of its powers," but it shows the understanding of Congress that in calling for information respecting foodstuffs and other necessities the Commission would be acting "within the scope of its powers" if it inquired into "production, ownership, manufacture," and "storage," with "figures of cost"

and prices, at least where such matters have any bearing on interstate commerce, and the information is requested from corporations engaged in interstate commerce.

The case of *Harriman v. Interstate Commerce Commission* (211 U. S. 407) is no authority for the construction of the Federal Trade Commission Act demanded by the appellees. In that case the Interstate Commerce Commission had under investigation relations between carriers and brought before it a director of the Union Pacific and asked him regarding his dealings in the stock of the company, and he declined to answer. The Court held that the Interstate Commerce Act did not authorize the Commission to subpoena witnesses and compel them to testify except in cases where the Commission was exercising quasi judicial powers in proceedings to enforce the Act. The Court did not hold that under the Act the Commission did not have the power to require reports from the corporations themselves. The Court referred to the section of the Interstate Commerce Act authorizing the Commission to require reports from carriers and said (page 422):

All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the commission may make without that aid but with the help of such

returns or special reports as it may require from the carrier, we need not decide.

In the *Goodrich Transit Company* case (224 U. S. 194, 212) it was said of the *Harriman* case:

The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court.

In the case of *Baltimore Grain Company* (284 Fed. 886) cited by appellee, the Federal Trade Commission demanded inspection of all books, papers, and private correspondence covering a period of a year, and it was held that the Act was not intended to give the Commission such power. The court brings out the distinction between the power of inspection and subpœna (indicating that it is limited to cases where a corporation is being "investigated" or "proceeded against") and the power of calling upon corporations engaged in interstate commerce to file reports. It may be that the power of the Commission, under Sections 9 and 10 of the Act, to subpœna witnesses and take depositions is limited to cases where there is a pending proceeding, but the power given in Section 6 to require annual and special reports and answers to inquiries is not so limited.

As Congress has power to require the disclosure of information relating to business of these companies that is not interstate commerce where the

accounts are commingled or the facts have a direct bearing on their interstate commerce, the provisions of the Act authorizing the Federal Trade Commission to require information respecting business of any corporation engaged in interstate commerce are plainly broad enough to authorize the Commission to require information respecting the business of these companies which is not interstate commerce, where the accounts are commingled or where the facts have a direct bearing on their interstate commerce business.

Finally the legislative history of the Act completely refutes the labored argument that Congress intended that the Commission could only require the production of information for use in pending proceedings to investigate specific charges of unfair competition or violation of the antitrust acts.

The manifest purpose of Congress in enacting the above-quoted paragraphs in Section 6 was to reenact (with added powers) Section 6 of the Act to establish the Department of Commerce and Labor, which section created the Bureau of Corporations and defined the powers of the Commissioner of Corporations. This purpose was expressly declared in the early draft of the bill to create the Federal Trade Commission. (H. R. 12120, 63rd Cong., 2d Sess.; S. 4160, 63rd Cong., 2d Sess.; H. R. 15613, 63rd Cong., 2d Sess.)

Congress intended to continue in the Federal Trade Commission the power of the Commissioner

of Corporations to investigate the business of corporations engaged in interstate commerce without regard to any specific proceeding, and make reports and recommendations to Congress, and to add to that power the power to require such corporations to make annual and special reports and answer inquiries, a power which the Commissioner of Corporations did not have.

Section 6 of the Act creating the Department of Commerce and Labor provided (Chap 552, 32 Stat., pp. 825, 828):

The said Commissioner [of Corporations] shall have power and authority to make, under the direction and control of the Secretary of Commerce and Labor, diligent investigation into the organization, conduct, and management of the business of any corporation * * * engaged in commerce among the several States * * * and to gather such information and data as will enable the President of the United States to make recommendations to Congress for legislation for the regulation of such commerce * * *.

In the only decision of a court construing the Act creating the Bureau of Corporations it was said:

It is clear to my mind that the primary purpose of the commerce and labor act was to enable Congress, by information secured through the work of officers charged with the execution of that law, to pass such

remedial legislation as might be found necessary. I regard this as the primary purpose, the chief purpose, a legislative purpose. It is clear from the act itself that, if there be a secondary purpose, the primary purpose, the legislative purpose, was vastly more important in the mind of Congress than any other. Congress wanted to know how the laws with regard to corporations were operating, how they were being evaded, how to strengthen them, in case they needed strengthening. In my judgment, the purpose of every one of these laws, the high aim of Congress in passing them, was a determined purpose that the corporation, the creature of the law, should not be allowed to grow beyond the law. The commerce and labor act is the repeated attempt of Congress to bring to its aid such information as would enable Congress to do whatever might be necessary for the control of corporations. Perhaps a secondary purpose was the punishment of offenders. It is perfectly clear to my mind that this was not the main purpose, because there were abundant laws already on the statute books for that, and a great department skilled in the work of punishing offenders. And still I am not able to say but that a secondary purpose of the commerce and labor act might have been the punishment of offenders. And I say this because it is not inconsistent with the act, or with the declared primary purpose, that this should be done so far as

the corporation itself is concerned. [*United States v. Armour & Co.*, 142 Fed. 808, 819.]

The House Committee on Interstate Commerce, in reporting the Federal Trade Commission bill to the House, said:

In section 3 the bill transfers to the commission all of the powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations. The broadest powers of that bureau and of the Commissioner of Corporations are embraced in the general provision of the law creating that bureau to investigate the organization, conduct, and management of the business of corporations, and to gather information and data to enable the President to make recommendations to Congress for legislation for the regulation of interstate commerce. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., p. 2.]

It was further said:

It must be remembered that this commission enters a new field of governmental activity. The history of the Interstate Commerce Commission is conclusive evidence that the best legislation regarding many of the problems to come before the interstate-trade commission will be produced from time to time as the result of the reports of the commission after exhaustive inquiries and investigations. No one can foretell the extent to which the complex interstate business of a great country like the United

States may require, alike for the benefit of the business man and for the protection of the public, new legislation in the form of Federal regulations, but such legislation should come by a sound process of evolution. Even the control of the railways in this country by the Interstate Commerce Commission affords no complete parallel to administrative control of the industrial corporations of the country by a Federal commission. It is largely the experience of the independent commission itself that will afford Congress the accurate information necessary to give to the country from time to time the additional legislation which may be needed. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., p. 8.]

The Report of the Committee also said:

While the powers, authority, and duties conferred upon the Bureau of Corporations and the Commissioner of Corporations are broad, there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce.

* * * * *

Therefore, in section 9 of the bill annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial condi-

tion, and general business conduct of those concerns. [Report of House Committee on Interstate and Foreign Commerce, No. 533, 63d Cong., 2d Sess., pp. 2, 3.]

A further statement by Mr. Covington is as follows:

If the gentleman was present during the early part of my remarks he must recall that I pointed out, at least to the best of my ability, that the power to gather the annual reports and the special reports which are to comprise the great body of information, producing that publicity which a great many men in America believe will be a great and salient safeguard for honest business in the future, is not a power now possessed by the Bureau of Corporations. [51 Cong. Rec., Part 9, 63d Cong., 2d Sess., p. 8848.]

Further light on the intent of Congress is found in other parts of the House Committee's Report, printed as Appendix A to the original brief of the appellants.

The powers set forth in Section 6, which the appellees contend are merely incidental, were, in the form in which the bill was originally drawn, unassociated with any power to deal with unfair competition, as the power of investigating unfair methods of competition was added by amendment. (H. R. 15613, 63d Cong., 2d Sess.)

The constitutional question can not be avoided by any interpretation of the Act. To construe

the Act as limiting the authority of the Commission to require reports to occasions where it has under consideration some particular charge of misconduct, or breach of existing law, is to distort its language and ignore the intent of Congress, so plainly apparent from its Journals.

CONCLUSION

These considerations and others mentioned in the original brief justify the conclusion that the power of Congress to require the disclosure by corporations engaged in interstate commerce of information respecting their private affairs is not limited to cases where some specific legislation is under consideration, or to cases where some legal or other proceeding is pending involving an investigation of a charge of violation of law, but that such information may be called for in the form of periodical reports and that an appropriate method of obtaining such information is through the agency of a commission such as the Federal Trade Commission; that such information must be, if Congress requires it, complete information, and if the corporations in question are engaged in other activities, information with respect to them may be properly demanded where their accounts are commingled or the facts have a direct relation to or bearing upon their interstate business; that such power exists as the result of the power to regulate commerce and the right of the legislative body to inform itself with respect to subjects

within its jurisdiction and power to legislate upon; +
 and that, under all the circumstances of this case,
 the character of the corporations involved and
 the nature of their business, the requirement of
 periodical monthly reports in the form submitted
 did not involve an unreasonable invasion of the
 right of privacy or an unreasonable search or ✓
 seizure under the Fourth Amendment, and that
 having this power, it is evident from the provi- +
 sions of the Federal Trade Commission Act that
 Congress intended that it should be exercised
 through the Commission.

If complainants feel that the Federal Trade
 Commission is invading to an undesirable extent
 the privacy of corporations engaged in interstate
 commerce, the remedy lies with Congress and not
 with the courts.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

W. H. FULLER,
Chief Counsel Federal Trade Commission.

ADRIEN F. BUSICK,
Attorney for the Federal Trade Commission.
 OCTOBER, 1925.

APPENDIX A

“An Act To create a Federal Trade Commission, to define its power and duties, and for other purposes,” approved September 26, 1914 (Chap. 311, 38 Stat., pages 717 et seq.).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the com-

mission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

SEC. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

Until otherwise provided by law, the commission may rent suitable offices for its use.

The Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the commission.

SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prose-

cute any inquiry necessary to its duties in any part of the United States.

SEC. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

“Commerce” means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

“Corporation” means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

“Documentary evidence” means all documents, papers, and correspondence in existence at and after the passage of this Act.

“Acts to regulate commerce” means the Act entitled “An Act to regulate commerce,” approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

“Antitrust acts” means the Act entitled “An Act to protect trade and commerce against unlawful restraints and monopolies,” approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of

an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law

so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of

the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method

of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (c) by reg-

istering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relations to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the

commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publica-

tion of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation sub-

ject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require, by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the

court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for

the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall will-

fully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than \$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

APPENDIX B

"An Act Making appropriations to supply deficiencies in appropriations for the fiscal year ending June 30, 1920, and prior fiscal years, and for others purposes," approved November 4, 1919 (Chap. 93, 41 Stat., pages 327 et seq.).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in appropriations for the fiscal year ending June 30, 1920, and prior fiscal years, and for other purposes, namely:

* * * * *

FEDERAL TRADE COMMISSION

For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, or within the scope of its powers, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices, \$150,000.

* * * * *

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End



APPELLEE'S

BRIEF

NOV 26 1923

WM. R. STANSBURY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

NO.



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FEDERAL TRADE COMMISSION AND VICTOR MURDOCK,
HUSTON THOMPSON, *et al.*, etc.,

Appellants,

against

CLAIRE FURNACE COMPANY, RELIANCE COKE COMPANY,
et al.,

Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

PAUL D. CRAVATH,
HOYT A. MOORE,

Of Counsel.



INDEX

	PAGE
STATEMENT OF THE CASE:	
Origin of the appeal	1
Statement of facts	2
The questions at issue.....	9
ARGUMENT:	
I. Congress has not conferred upon the Commission any such power as the Commission seeks to exercise in requiring the information called for	12
A. The sole source of authority of the Commission is the Federal Trade Commission Act	12
B. The Federal Trade Commission Act does not purport to authorize the Commission to make a general investigation of an industry or intrastate business in any case	14
(1) Analysis of the Act.....	15
(2) Scope of the Act.....	19
(3) Section 6 must be construed as part of an entire statute	20
(4) Possible constructions of Section 6.	23
(5) The construction by the Commission is not warranted by departmental interpretation	30

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	PAGE
(6) Consequences of such construction .	31
(7) Our construction is supported by the other sections	35
(8) Our construction is supported by the history of the Interstate Commerce Commission	38
(9) Our construction is supported by the decision in the Terminal Taxi- Cab Company case	41
(10) The construction by the Commis- sion calls for unprecedented and unauthorized power	42
Conclusion	45
C. The orders of the Commission to the ap- pellees exceed the power granted to the Commission	47
(1) The Act applies only to the inter- state commerce of corporations....	47
(2) The Commission can not regulate prices	49
(3) The investigations authorized must relate to the purposes of the Act...	53
(4) The Act does not authorize investi- gations of economic conditions.....	54
II. Congress could not grant to the Commission power to investigate the manufacturing ac- tivities of corporations which sell their output in interstate commerce	58

	PAGE
A. The power of Congress over interstate commerce does not extend to manufacturing or mining	60
(1) The States have power to regulate manufacturing and mining	60
(2) Congress can not regulate manufacturing or mining	62
(3) Congress has power to control obstructions to the freedom of commerce	65
(4) The decision in the Stockyards Case was based upon such power..	67
B. Although the Commission may have investigatory power over such business of the appellees as is interstate commerce this does not give it such power over their other business	71
C. Neither Congress nor the Commission has any power to require information on any matter over which it has no regulatory power	78
D. The inquiry of the Commission does not relate to interstate commerce	82
E. Enforcement of the demands of the Commission would violate rights secured to the appellees by the Fourth Amendment to the Constitution	86
III. The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the appellants from the files should be affirmed.....	98

TABLE OF CASES CITED.

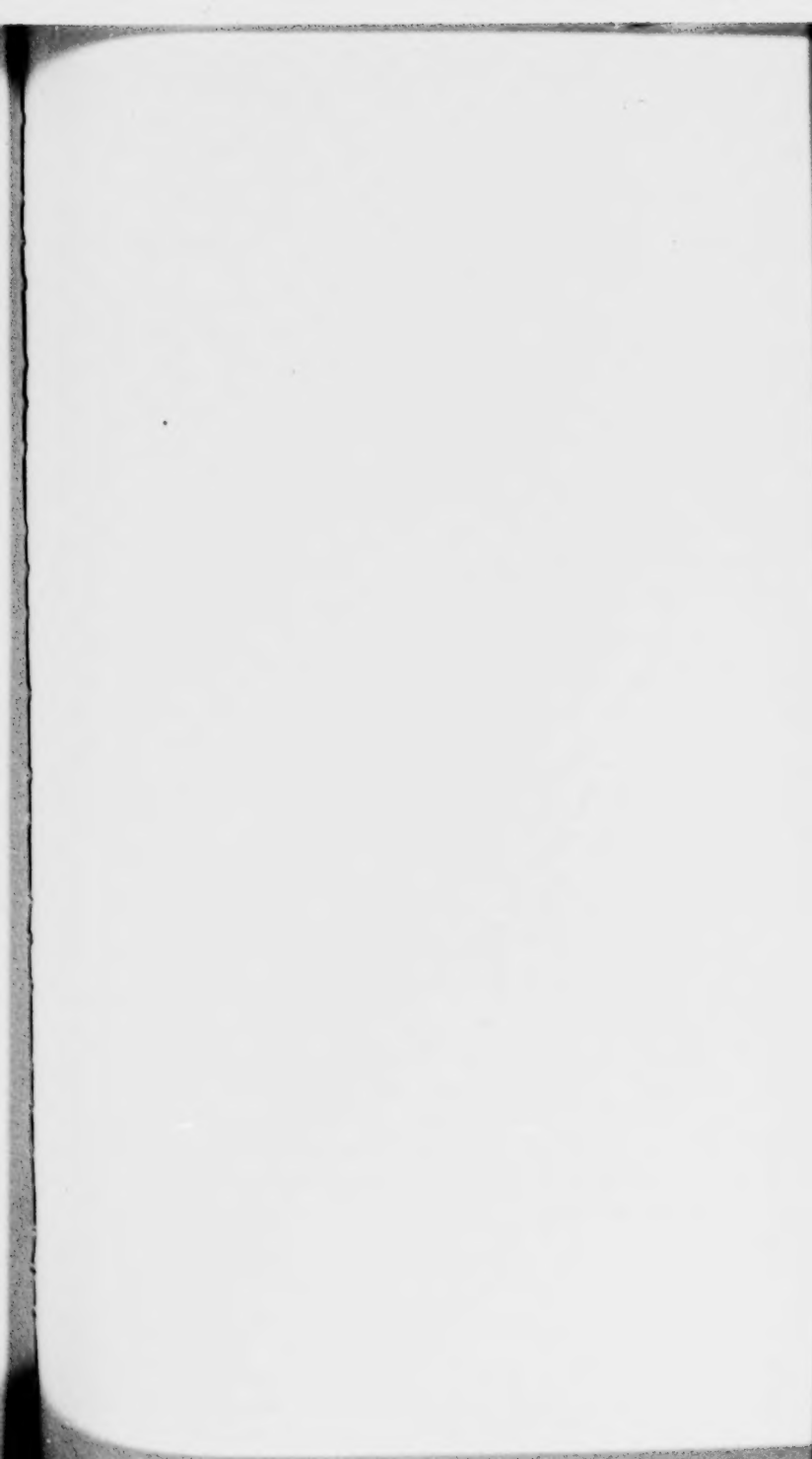
	PAGE
<i>Addystone Pipe & Steel Co. v. U. S.</i> (175 U. S., 211).....	66
<i>American Column and Lumber Company v. United States</i> (257 U. S., 377).....	85
<i>Amos v. United States</i> (255 U. S., 313, 315).....	94
<i>Board of Trade v. Olsen</i> (262 U. S., 1; 67 L. Ed., 519).....	69, 70
<i>Boyd v. U. S.</i> (116 U. S., 616).....	86
<i>Brown v. Duchesne</i> (19 How., 183, 194).....	21
<i>Chapman, In re</i> (166 U. S., 661).....	39
<i>Child Labor Cases</i> (259 U. S., 20, and 247 U. S., 251).....	43, 66
<i>Counselman v. Hitchcock</i> (142 U. S., 547, 585).....	90
<i>Crescent Oil Company v. Mississippi</i> (257 U. S., 129, 136).....	61, 62
<i>Ellis v. Interstate Commerce Commission</i> (237 U. S., 434, 445) ..	57, 81, 92, 97
<i>Entick v. Carrington</i> (19 Howell's State Trials, 1029).....	96
<i>Federal Trade Commission v. Baltimore Grain Company</i> (284 Fed., 886, 890)	28, 49
<i>Federal Trade Commission v. P. Lorillard Company</i> (283 Fed., 999, 1005)	26
<i>First Employers Liability Cases</i> (207 U. S., 463, 502).....	43, 65
<i>Gasoline Pump Cases</i> (261 U. S., 463; 67 L. Ed., 483, 488).....	76
<i>Gould v. United States</i> (255 U. S., 298, 303).....	94, 95
<i>Green, In re</i> (52 Fed., 104, 112).....	32
<i>Hale v. Henkel</i> (201 U. S., 43).....	81, 90, 92, 93, 97
<i>Harriman v. Interstate Commerce Commission</i> (211 U. S., 407) 24, 25, 26, 31, 32, 33, 42, 52, 80, 91, 97	
<i>Heisler v. Thomas Colliery Co.</i> (260 U. S., 245; 67 L. Ed., 119, 122)	60, 61
<i>Interstate Commerce Commission v. Baird</i> (194 U. S., 25).....	94
<i>Interstate Commerce Commission v. Brinson</i> (154 U. S., 447)....	38, 81, 91
<i>Interstate Commerce Commission v. Goodrich Transit Company</i> (224 U. S., 194).....	38, 41, 42, 71, 72, 73, 74, 80, 92, 94
<i>Jackson, ex parte</i> (96 U. S., 727, 733).....	96

V

	PAGE
<i>Jacobson v. Massachusetts</i> (197 U. S., 11, 22)	58
<i>Kidd v. Pearson</i> (128 U. S., 1, 20)	33, 60
<i>Kilbourn v. Thompson</i> (103 U. S., 168)	88, 89, 97
<i>Maynard Coal Company v. Federal Trade Commission</i> (48 Wash. Law Rep., 278)	7, 29
<i>Mennen Company v. Federal Trade Commission</i> (288 Fed., 774, 781)	77
<i>Northern Securities Case</i> (193 U. S., 197, 384)	52
<i>Oliver Iron Mining Co. v. Lord</i> (262 U. S., 172; 67 L. Ed., 573, 576)	60, 61
<i>Pennsylvania v. West Virginia</i> (262 U. S., 553, 623; 67 L. Ed., 762) ..	61
<i>Silverthorne Lumber Company v. U. S.</i> (251 U. S., 385)	93, 97
<i>Smith v. Interstate Commerce Commission</i> (245 U. S., 33, 43)	37, 38, 39
<i>Stafford v. Wallace</i> (258 U. S., 495)	67, 68, 70
<i>Story on the Constitution</i> (sections 907, 908)	59
<i>Terminal Taxi-Cab Company v. District of Columbia</i> (241 U. S., 252, 256)	41, 42, 73, 81
<i>United Mine Workers v. Coronado Coal Co.</i> (259 U. S., 344, 410) ..	65
<i>United States v. Basic Products Co.</i> (260 Fed., 472)	23, 26, 29
<i>United States v. Boyer</i> (85 Fed., 425, 431)	59
<i>United States v. Colgate & Co.</i> (250 U. S., 300, 307)	76
<i>United States v. Freight Association</i> (166 U. S., 290, 320)	77
<i>United States v. E. C. Knight Co.</i> (156 U. S., 1, 11)	62, 64
<i>United States v. L. & N. R. R. Co.</i> (236 U. S., 318)	36
<i>United States v. Jin Fucz Moy</i> (241 U. S., 394)	22
<i>Wilson</i> (President's Message to Congress, Jan. 20, 1914)	55, 56
<i>Wolf Packing Co. v. Court of Industrial Relations of Kansas</i> (262 U. S., 522; 67 L. Ed., 756, 760)	49, 76, 78

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

	PAGE
United States Constitution:	
Fourth Amendment	11, 86, 87, 88, 89, 91, 92, 93, 94, 95, 97, 98
Fifth Amendment	91, 97
Tenth Amendment	11
Act to Regulate Commerce (24 Stat., 379)	19, 23, 24, 29, 32
Bureau of Corporations Act (32 Stat., 825)	30
Clayton Act (38 Stat., 730)	14, 52, 53, 54, 78
Deficiency Appropriation Act, fiscal year 1920 (41 Stat., 328)	13, 14
Federal Trade Commission Act (Chap. 311, 38 Stat., 717) :	
Section 1	15, 19
Section 2	15, 19
Section 3	15, 19
Section 4	15, 19, 20
Section 5	16, 19, 20, 21, 22, 23, 29, 47, 53, 54, 74, 78
Section 6	4, 5, 8, 16, 19, 20, 21, 22, 26, 35, 37, 38, 45, 46, 54, 83
Section 7	17, 19
Section 8	18, 19
Section 9	8, 18, 19, 20, 35
Section 10	5, 18, 19, 20, 35, 36, 37
Section 11	19
Hepburn Act (34 Stat., 584)	36
Opium Registration Act of 1914 (38 Stat., 785), Section 8	22
Sherman Anti-Trust Act (26 Stat., 209)	52, 54, 66, 85, 90



IN THE
Supreme Court of the United States

FEDERAL TRADE COMMISSION AND VICTOR
MURDOCK, HUSTON THOMPSON, *et al.*,
Etc.,

Appellants,

against

CLAIRE FURNACE COMPANY, RELIANCE
COKE COMPANY, *et al.*,

Appellees.

October Term, 1923
No. 250.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This cause originated in the Supreme Court of the District of Columbia upon a bill of complaint against the Federal Trade Commission and the members thereof as such to restrain the prosecution of certain demands by the Commission for reports and answers from the several appellees. A temporary restraining order was issued. The appellants (to whom hereinafter we shall refer as the Commission) filed an amended answer which in large measure admitted the allegations of specific facts and pleaded various propositions of law and legal conclusions from the facts alleged in the bill or in the answer. The appellees moved to strike out certain matters from the answer and also to strike the entire answer from the files.

The District Supreme Court, with a view to avoiding further litigation and of bringing about a prompt settlement of the matters of public interest involved in the cause, denied the motion to strike out parts of the answer without prejudice to the appellees. It granted the motion to strike out the entire answer on the ground that it did not state a defense, and enjoined the Commission from prosecuting its demands for the reason that the Commission could not constitutionally be authorized and had not been authorized by law to require or demand the reports and answers or that it be furnished with the information and data demanded by it. (Record, page 100.) The Commission appealed to the Court of Appeals of the District of Columbia, which sustained the decree of the District Supreme Court. Thereupon the Commission prosecuted this appeal from the judgment of the Court of Appeals.

The pleadings in the case are voluminous and an analysis thereof in sufficient detail to bring into relief the issues of fact raised thereby would of necessity be elaborate. The motion to strike out the answer is, however, based upon a few principles of law which the answer endeavors to controvert but which, if sound, must render unnecessary any lengthy statement or exhaustive consideration of such facts as might by the pleadings have been put in issue. Such facts as are not fully set out in the Brief for Appellants and are necessary to a proper presentation of the legal issues involved in this appeal are as follows.

Statement of Facts.

The appellees are twenty-two corporations organized under the laws of various States, in which States or in some one or more other States *the respective appellees are engaged in the manufacture of coke or various products of iron or steel from coal or iron ore mined or purchased by them.* (Record, pages 2, 3, 6 and 7.) *This is not*

denied in the answer. None of the appellees appears to be in the business of mining coal or iron ore for the general market; some of them which produce coal and iron ore for their own use also purchase additional coal or ore. (Record, pages 6 and 7.) Certain of the appellees manufacture pig iron; others manufacture coke from coal mined by them; others manufacture pig iron and various steel products; one appellee manufactures only car wheels and locomotive tires, another only tin plate; other appellees either directly or through subsidiary or affiliated companies produce coal and iron ore and manufacture coke, pig iron and various steel products, either crude steel or in some cases semi-finished steel products and in others finished steel products of various kinds. (Record, pages 6 and 7.) In general, the appellees can roughly be classed as producers of pig iron or of coke or of steel products and some of the appellees produce all three.

Those appellees which mine coal or ore ship a part thereof to their coke plants or iron furnaces, which in some instances are in the respective States where the coal or ore is mined and in other cases are in different States and thus interstate shipments are involved. The coal and ore purchased by some appellees may in some cases also involve interstate shipment. The pig iron and steel products manufactured by some of the appellees are to some extent sold and shipped out of the respective States where manufactured. The percentage borne by such shipments to the total shipments of the several appellees varies greatly as to different products and as to different appellees. (Record, pages 5 to 7.) Notwithstanding that the Commission makes specific allegations as to such respective percentages (Record, page 79) and clearly recognizes the distinction between the manufacturing and mining of the appellees and their commercial transactions, it alleges in the answer (Record, page 79) that the interstate and intrastate commerce of each appellee is conducted as a single non-separable whole. The Commission did not differentiate between

interstate and intrastate commerce in any of its inquiries. (Brief for Appellants, page 5.)

It is, however, apparent that all the appellees are manufacturing corporations the interstate commerce of which consists solely in the purchase and shipment from one State to another of some raw materials and the sale and like shipment of some manufactured products.

The fundamental claim of the Commission is that such purchases and sales and such shipments bring the appellees within the jurisdiction of the Commission as corporations engaged in interstate commerce and that therefore from them the Commission can require complete information as to all their business, both interstate and intrastate, including production and manufacturing costs. (Record, page 80.)

The Commission on December 15, 1919, adopted a preamble and resolution (Record, page 11) wherein it was recited that the Committee on Appropriations of the House of Representatives had asked the Commission to suggest what the Commission might do to reduce the high cost of living and that the Commission had recommended to the Committee that it would be desirable to obtain and publish current information with respect to food stuffs and other necessities and particularly with respect to certain basic industries, including coal and steel, and that as a consequence the Committee recommended and Congress appropriated \$150,000 for the Commission for the fiscal year then current. The Commission thereupon resolved, "by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission Act," to proceed to collect and publish such information with respect to such basic industries as said appropriation and other available funds would permit and that such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke and pig iron industries. The Federal

Trade Commission Act and the paragraphs of section 6 thereof above referred to will for brevity hereinafter sometimes be referred to as the Act and as paragraph (a) and paragraph (b), respectively.

The Commission then served upon the appellees engaged in manufacturing iron and steel an order (Record, page 12) reciting that the Commission, pursuant to such resolution, under the powers conferred upon the Commission in paragraphs (a) and (b) and in consideration of a special appropriation by Congress for such purposes, required the appellees to report their monthly costs of production for various products and other data as specified in forms enclosed with the order. The order called for monthly reports, except as to balance sheet and income statement which were to be annual, for each month of the calendar year 1920. Like orders were served upon the appellees engaged in mining coal and manufacturing coke. Attached to the forms enclosed with the order was a notice embodying paragraph (b) and the provisions of section 10 of the Act covering false reports and failure to make reports required by the Act. (Record, page 13.)

The data referred to in the order and to be covered by monthly reports on the forms enclosed therewith consisted of

(1) statements of the quantities of forty-four specified products produced at each plant of the several appellees, which products vary from raw materials like coke to crude products like pig iron and steel ingots and finished steel products like rails, structural shapes, cotton ties and wire nails;

(2) cost sheets covering twenty-five specified products for each battery of ovens or furnace, mill or other type of operation;

(3) statements of sales prices, meaning "the actual realization f. o. b. mill, after deduction of freight allowances made to purchaser," with respect to nineteen specified products, including separate

reports thereon in respect of domestic and export shipments;

(4) statements of the contract prices, meaning "the base price less freight allowances to be paid by purchasers and to be deducted from invoices," with respect to the same nineteen products, contracts being defined as including all agreements whether by formal, written instruments or orders booked, an explanation being required to be furnished of any unusual prices;

(5) statements of the capacity of the ovens, furnaces, works and mills in respect of eighteen specified commodities;

(6) statements of orders booked during the month and the quantities of unfilled orders outstanding at the end of each month in respect of the same nineteen commodities the sales and contract prices of which were to be reported;

(7) statements of the depreciation and general administrative and selling expenses allocated to seventeen specified commodities and an income statement covering sales, cost of sales, depreciation, general and administrative and selling expenses, net income from operations, income from other sources, deductions from net income, balance of net income transferred to surplus, with details of the income of the appellees from interest, rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies and income from outside investments and details of deductions from net income for Federal taxes, interest on bonds, interest on notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization of excess cost of construction, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officers. (Record, pages 15-34.)

The forms enclosed with the orders served upon the appellees producing coal and coke called for similar information in the same exacting detail as to the internal

affairs of the corporations. (Record, pages 37-54.) In each case the Commission provided in its orders for subsequent inspection of the books and accounts from which the reports should be made. (Record, page 8, admitted in Answer, Record, page 80.)

The inquiry thus covered production figures and capacities, costs, sales prices, amount of business booked and completed and the corporate financial affairs, with no limitation to interstate transactions and no questions thereon.

The appellees not having complied with these orders, the Commission served further orders and demands upon them, including a notice under date of May 6, 1920 (Record, page 62), that the reports from the iron and steel industry were overdue for January, February and March in that year and that the Commission would continue to require such reports notwithstanding the decision in the *Maynard Coal Company* case. In that case the Supreme Court of the District of Columbia had restrained the Commission from proceeding against Maynard Coal Company for failure to furnish the above described reports. In such letter it was stated that "The Commission believes that this information is useful and important to the general public and also to the iron and steel industry."

The Commission having indicated its determination to require reports notwithstanding such decision and having directed the attention of the appellees to the penalties provided by the Act for failure to comply with orders of the Commission, the appellees thereupon filed their bill of complaint to restrain further proceedings by the Commission in respect of such orders. On the same day the Commission instituted a mandamus action to compel one of the appellees to file the required reports and within a few days instituted a similar action against another of the appellees, which actions are stayed pending the determination of this cause. The complaint was, therefore, not filed as the result of those actions, as intimated in the Brief for Appellants (page 2).

No complaint of any violation of any law, whether Federal or State and whether or not one in which the Commission could properly be interested, had been filed against the appellees by or with the Commission. (Record, page 5.) The Commission, notwithstanding the reference to paragraphs (a) and (b), averred in its answer that it sought the information for all the purposes authorized by law and based its authority to require the information also upon paragraphs (f) and (g) of section 6 and on section 9 of the Act and on all the authority conferred upon it by Congress. (Record, page 78.) Among the purposes specifically avowed were the gathering of the desired information for publication, the regulation of the interstate commerce of the appellees by such publication of facts relating to all the business of the appellees and the making of reports to Congress and recommendations for additional legislation. (Record, pages 78-79.) The answer also averred (Record, page 79) that all the desired information was necessary and had a direct relation to the regulation and control of the interstate and foreign commerce of the appellees, in which it was alleged sixty-five per cent. or more of the sales by each of the appellees (except three) were made, and that the interstate and intrastate commerce of each appellee was conducted as a non-separable whole.

The answer consisted largely of averments as to the power of Congress to secure information and as to the grant of such power by Congress to the Commission, the gist of the answer being that when a mining or manufacturing corporation sells any part of its product in interstate commerce all the business of such corporation is thereby subject to inquiry by the Commission and regulation by Congress, particularly if the interstate cannot be separated from the intrastate business of the corporation. Great stress was laid upon the importance of coal and steel in the industrial and commercial life of the several States and in one of its argumentative averments the Commis-

sion specifically said that the appellees were engaged in a business which "by reason of the nature thereof and its relation to the need of organized society, is charged with a public interest and is subject because of that interest as well as because of its appearance in part, at least, in interstate commerce to the right of* the power of the Congress to obtain information with relation to the whole of the industry * * *." (Record, page 83.)

The Questions at Issue.

The averments of the answer consisted so largely of statements as to the law and legal conclusions based on such statements that it brought in issue no questions of fact requiring proof before the case could be determined, hence the motion to strike the answer from the files. In large measure, it is an argument upon the right of the Commission to pursue the inquiry which it started. This argument is based on the following premises:

(1) That, inasmuch as Congress has complete power to regulate interstate commerce, it can require any information which it may desire from any corporation engaging in interstate commerce as the result of engaging therein. (On this premise the power claimed is not limited to corporations although perhaps Congress might, if it possesses such power, reasonably distinguish between corporations and individuals.)

(2) That Congress has authority, under its power to regulate interstate commerce, to require information as to the interstate commerce conducted by any corporation and, if such corporation is also engaged in intrastate commerce, to require information as to such intrastate commerce, particularly if both are conducted as a unit and

*and' in the original amended answer.

the two phases can not be separated. (If the existence of such power be granted, this also would appear to apply to individuals although Congress might conceivably distinguish between individuals and corporations in some of its requirements.)

(3) That in the case of corporations engaged in the production or manufacture of products that enter into interstate commerce, the Commission, by virtue of the power of Congress to regulate interstate commerce, has authority to require such corporations to furnish information regarding the production and manufacture, as well as the sale, of their products.

(4) That Congress can authorize a commission to compel the giving of information and the production of documents in any inquiry which such commission may desire to make upon any subject in respect of which Congress may have any power of legislation.

(5) That the industry in which the appellees are engaged is charged with a public interest and for that reason Congress has power to require full information in respect thereof.

The objections of the appellees to furnishing the information required are based upon these principles:

(1) That, except perhaps as to its sales and purchases in interstate commerce, Congress has no power to regulate, and therefore has no authority to inquire into, the business of any of the appellees and has not intended to, and could not lawfully, delegate to the Commission authority to make inquiry into such business except in respect of a reasonably suspected violation of Federal law;

(2) *That the sales of finished products and the purchases of raw materials are entirely separate from the manufacture or mining in which the several appellees are engaged and for any lawful purpose of the Commission any proper information in respect of such sales or purchases can be secured separately;*

(3) *That the unauthorized examination into the business affairs of the appellees is a violation of their rights protected by the Fourth Amendment to the Constitution and is in contravention of the Tenth Amendment, since it involves the enforced surrender of information of a private character not for any proper national purpose and requires the exercise of a power not delegated to Congress;*

(4) *That even if the Commission can require information regarding the appellees' prices in respect of interstate sales it has no authority to require such information regarding intrastate sales, which are clearly capable of being distinguished from interstate sales, the allegation to the contrary in the answer being a conclusion of law and not a statement of fact;*

(5) *That Congress itself has no jurisdiction, and did not and could not give to the Commission authority, over any industry as a whole which, unlike such industries as transportation, affects interstate commerce only through the purchase of raw materials and the sale of finished products requiring shipment in interstate commerce; and*

(6) *That Congress can not authorize an administrative body to make an investigation of an industry in all of its phases simply because Congress may have power to legislate in respect of some of its phases.*

The appellees are contesting this cause not merely to protect their own rights but because of the conviction that

the cause is of supreme importance to themselves and to all other citizens, involving as it does fundamental rights secured by the Federal Constitution and the exercise of unwarranted power by a Federal authority in subjects which have never been entrusted to the dominion of the Federal Government. The position of the appellees is in substance (1) *that Congress has not attempted to give and has not given to the Commission such authority as the Commission seeks to exercise* and (2) *that the Federal Government has no such jurisdiction over the business of the appellees as is sought to be exercised by the Commission.*

ARGUMENT.

I.

Congress has not conferred upon the Commission any such power as the Commission seeks to exercise in requiring the information called for.

The Commission has not received any grant of authority applicable to the matter in issue other than such as is contained in the Act, although from the references made by the Commission to the appropriation by Congress above referred to it would seem that some such authority is claimed to derive therefrom.

A. The sole source of authority of the Commission is the Federal Trade Commission Act.

If the Act has not granted to the Commission power to investigate an *industry* generally or the *intrastate* business of corporations, the Commission has no such authority. There is no other enactment of Congress which purports to give to the Commission any such authority. In the

preamble to the resolution of the Commission above mentioned, the Commission referred to the Deficiency Appropriation Act of November 4, 1919. This included a grant of \$150,000 to the Commission

"For all expenses necessary in connection with the collection of information as may be directed by the President of the United States, or within the scope of its powers, regarding the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices, \$150,000." 41 *U. S. Statutes*, 328.

The President has no inherent power to investigate corporations and we know of no power under which, by virtue of his office alone, he can direct to be made such investigations as are here attempted. However this may be, there is no allegation in the pleadings that the President has directed the Commission to collect the information which it is endeavoring to collect. Therefore the action of the Commission cannot be based upon the reference in the Appropriation Act to the direction by the President. We are unable to apprehend how this clause can be other than the grant of money to carry on investigations, on particular matters to be selected by the President, under powers assumed already to exist.

A grant of funds to the Commission to collect information "within the scope of its powers" of course confers no authority not previously possessed, so that in this respect the Commission is thrown back upon the Federal Trade Commission Act as the source of its authority.

From the very recital in the preamble quoted in the order of the Commission it appears that the Commission recommended an investigation as to *foodstuffs* and *other necessities* and *particularly with respect to various basic industries, including coal and steel*. Yet Congress in mak-

ing its appropriation says nothing of basic industries or of coal or steel but speaks only of *foodstuffs and other necessities*. If the preamble throws any light upon the purposes of the appropriation, it is dim in comparison with the shadow cast by it upon any implication that Congress granted power to investigate basic industries. The very industries which the Commission specially mentioned and which it endeavors to investigate are not mentioned by Congress, which names only *foodstuffs and other necessities*. It seems clear that Congress was appropriating funds for an investigation into the high cost of foodstuffs and other necessities of life of the same general character, not steel billets, coke or pig iron.

As the appropriation was to be used in investigations directed by the President or within the scope of the powers of the Commission and there is no indication in the pleadings that the President has given any directions as to the present undertaking of the Commission, it must find its authority within the scope of such powers as it possessed outside the Appropriation Act. Thus, clearly, the Commission can derive from that Act no authority for its present unprecedented venture.

B. The Federal Trade Commission Act does not purport to authorize the Commission to make a general investigation of an industry or intrastate business in any case.

The Act was approved on September 26, 1914, as part of the legislative program of President Wilson for the regulation of interstate commerce. The Clayton Act, which was approved a few weeks subsequently as another part of such program, was intended to cover certain objectionable practices deemed to be injurious to interstate commerce and forbade specifically the use of such practices in interstate commerce or so as to affect such commerce. The Act with which we are concerned covered two specific difficulties: (1) those practices of various kinds which were

deemed to be injurious to interstate commerce through interference with the freedom of competition therein and were so multifarious as in the opinion of Congress not to be susceptible of classification and specification and (2) the inability of business men to ascertain except through long and expensive litigation, often involving them as defendants in criminal prosecutions, what is or is not permitted by the Anti-Trust Laws. The first difficulty was intended to be met by declaring the objectionable practices to be unlawful and the second difficulty by the establishment of a Commission to which business men could look for guidance as to border-line practices and which could make investigations to determine whether or not the Anti-Trust Laws and the prohibition of unfair practices were being obeyed. There is no intimation in the Act that Congress deemed it within its power or intended in any regard to assume general jurisdiction over corporate enterprise. *The Act relates exclusively to commerce as defined in the Act and in so far as it affects corporations it affects only those which are engaged in such commerce and those only to the extent that they are therein engaged.*

1. Analysis of the Act.

Sections 1, 2 and 3 deal with the establishment of the Commission and the transfer to it of the organization and work theretofore carried on by the Bureau of Corporations. Section 4 is devoted to definitions. Commerce is therein defined as follows:

“‘Commerce’ means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.”

Corporation is so defined as to include any association, whether incorporated or not and whether issuing stock or not, except partnerships, organized to carry on business for profit. The terms "Acts to regulate commerce" and "Anti-Trust Acts" are also defined in the section.

In Section 5 is found the only addition to substantive law made by the Act, this addition being the declaration that unfair methods of competition in commerce are unlawful. The section then proceeds to empower the Commission to prevent the use of such methods in commerce and provides machinery for the enforcement of the new law by the Commission.

Section 6 provides that the Commission shall also have power

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of *any corporation engaged in commerce* excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations and partnerships;

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe and shall be filed with the commission within such reasonable period

as the commission may prescribe, unless additional time be granted in any case by the commission.”;

(c) To investigate the manner in which any decree in any suit under the Anti-Trust Acts is being carried out and to report thereon to the Attorney General or to make public its reports;

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the Anti-Trust Acts by any corporation;

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the Anti-Trust Acts;

“(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest”; to make annual and special reports to Congress and recommendations for additional legislation and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use;

(g) To classify corporations and to make rules and regulations for the purpose of carrying out provisions of the Act; and

(h) To investigate trade conditions in and with foreign countries where associations, combinations or practices or other conditions may affect the foreign trade of the United States and to report to Congress thereon with recommendations.

Section 7 authorizes courts, if after the taking of testimony the complainant shall be found entitled to relief, to refer to the Commission any suit in equity brought by or under the direction of the Attorney General as provided in the Anti-Trust Acts in order that the Commission may report an appropriate form of decree.

Section 8 requires the several Departments and Bureaus of the Government, when directed by the President, to furnish the Commission upon its request all records, papers and information in their possession relating to any corporation subject to any of the provisions of the Act.

Section 9 provides that *for the purposes of the Act* the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of *any corporation being investigated or proceeded against*, and power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. The Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Upon the application of the Attorney General, at the request of the Commission, the district courts of the United States have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of the Act or any order of the Commission made in pursuance thereof. The Commission may order testimony to be taken by deposition *in any proceeding or investigation pending under the Act*.

The section also provides that evidence shall not be withheld on the ground of incrimination and that no enforced testimony shall be used in prosecution of a witness, except for perjury.

Section 10 provides punishment for refusal to testify or "to answer any lawful inquiry" or to produce documents or make reports and similar punishment for false entries or statements in any report or for any false entry in any account, record or memorandum kept by any corporation subject to the Act, or for failure to make full,

true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation. Any officer or employee of the Commission who, without its authority, shall make public any information obtained by the Commission, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

Section 11 provides that nothing in the Act shall be construed to prevent or interfere with the enforcement of the Anti-Trust Acts or the Acts to regulate commerce or to alter, modify or repeal such Acts.

2. Scope of the Act.

It thus appears that of the eleven sections the first three relate to the organization of the Commission, the fourth is taken up with definitions, the fifth declares unlawful unfair methods of competition in commerce and prescribes the procedure for dealing therewith, the sixth and seventh deal with powers of the Commission, the eighth covers the relations of other departments of the Government to the Commission, the ninth deals with investigatory powers of the Commission, the tenth provides penalties for interference with the carrying out of such powers and the eleventh relates to other statutes. Thus it is clear that the entire statute deals with only two things, the organization of the Commission and the legislation against unfair methods of competition in commerce and that the Commission was given no powers except (1) to secure information, (2) to assist in anti-trust litigation or (3) to prevent the use of the forbidden unfair methods.

It will be noticed that the Act as a whole deals exclusively with commerce and particularly with the

interferences therewith condemned by the Anti-Trust Laws and by section 5 of the Act. Except for paragraphs (a), (b), (f), (g) and (h) of section 6, all the powers granted to the Commission deal with the enforcement of section 5 or with assistance to the courts or to the Attorney General in respect of violations of the Anti-Trust Laws. In considering the question here involved, that is, the function of the Commission as an investigatory body, only sections 4, 5, 6, 9 and 10 directly affect the problem and of these only sections 5, 6 and 9 purport to grant authority to the Commission.

The power granted in section 5 is limited to dealing with unfair methods of competition. The section gives no specific power to investigate except upon a complaint, when hearings are to be had. It is evident that section 9 grants no original authority independent of the other sections of the Act since any authority exercised under section 9 must be exercised for the purposes of the Act, which purposes must be sought elsewhere in the Act. The matter regarding which evidence can be required must be one under investigation and the corporation to the documents of which the Commission may have access must be one being investigated or proceeded against under the authority of some other section of the Act. *Any independent power of investigation which the Commission may have must, therefore, be found not in section 9 but in section 6.*

3. Section 6 Must be Construed as a Part of an Entire Statute.

Of the eight separate powers distinguished in section 6, three (c, d and e) relate to violations of the Anti-Trust Acts and one (h) relates to foreign commerce; the first two (a and b) authorize the securing of information

concerning corporations engaged in commerce; another (f) covers the publication of such information and reporting thereon to Congress and another (g) authorizes the classification of corporations. The question, therefore, narrows itself to this: Does section 6, and particularly do paragraphs (a) and (b) thereof, confer upon the Commission power to examine the affairs of a corporation entirely regardless of the other sections of the statute or in disregard of the applicability of section 5 or the Anti-Trust Laws to such corporation or to the character of the business being examined? In other words, is the Commission authorized under section 6 to proceed like the Census Bureau simply to gather information concerning corporations or is its power under paragraphs (a) and (b) related to the other sections of the Act? It is clear that this question cannot be answered merely by directing attention to paragraphs (a) and (b) and ignoring all the remainder of the Act, for under the general rule of construction the meaning of a section of a statute must be gathered by construing it in its relation to the statute as an entirety.

In *Brown v. Duchesne*, 19 Howard, 183, Mr. Chief Justice TANEY used this language, page 194:

"The general words used in the clause of the patent laws granting the exclusive right to the patentee to use the improvement, taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its

various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning."

How this principle is applied is well illustrated in the case of *United States v. Jin Fuez Moy*, 241 U. S., 394, which involved possession of a drug by a person not registered as belonging to one of those classes permitted to possess such drugs. Section 8 of the statute in question provided penalties for the possession of such drug by any unregistered person. The Court construed the words "any person not registered" in section 8 as meaning any person of the classes named in section 1. The words certainly did not say that but the Court properly sought the sense of the words by examining the entire statute and considering the design shown by the statute as a whole.

Even upon an examination of the two paragraphs (a) and (b) alone it appears, however, that the information to be procured is from corporations *engaged in commerce*. In the lower Courts it was openly contended on behalf of the Commission that this includes information as to any business of any corporation engaged in commerce *in any degree*, since any corporation by so engaging subjects itself and all its affairs to the investigatory power of the Commission. The argument in the Brief for Appellants is more subtle but the contention still is made by implication. Such argument would require the ignoring of all the references in the other paragraphs of section 6 and in other sections of the Act to violations of the Anti-Trust Laws and the complete ignoring of the only substantive provision of the Act, the heart of the Act, section 5.

There are at least three possible constructions of paragraphs (a) and (b) which do no such violence to the Act as a whole as is wrought by the construction offered by the Commission.

4. Possible Constructions of Section 6.

(a) In the case of *United States v. Basic Products Company*, 260 Fed., 472, these paragraphs were considered by Judge ORR, of the Western District of Pennsylvania. The Commission there sought by mandamus to procure information as to the costs of production of an article sold in interstate commerce, the purpose being to furnish such information to the Navy Department, which was endeavoring to determine what would be just compensation for a quantity of such article ordered by it. The Court held that Congress did not intend to grant the extreme power of paragraphs (a) and (b) in respect of manufacturing corporations but only in respect of corporations *engaged in commerce as their principal function* and stated that there were corporations so engaged not covered by the Act to Regulate Commerce and not engaged in such commerce merely in the buying and selling of goods. The Court instanced corporations engaged in water transportation, lightering and forwarding. This interpretation of the paragraphs in question renders them applicable only to a special class of corporations among all those which have some interstate dealings and certainly accords with the language of the paragraphs and with the other sections.

(b) Under the second interpretation the paragraphs would be construed as authorizing an investigation into the commerce (as defined in the Act) of any corporation which in any way is engaged in such commerce. This would cover all the business of any corporation of the class referred to in the *Basic Products* case (those engaged exclusively in such commerce) and the part of the business of any other corporation to which the Anti-Trust Laws or section 5 can apply. Reason would thus be shown for including these paragraphs with the remainder of the Act because all relate to the legislation by Congress to secure freedom of competition in commerce, and the paragraphs

give power to ascertain whether such legislation is being obeyed. On the construction on which the Commission is proceeding we have first a mass of legislation dealing with restraints on competition in commerce and then an act adding a new story to the edifice and incidentally appointing a watchman to guard it but with power to roam near and far and unlimited rights to trespass.

(c) On the third interpretation the powers granted by paragraphs (a) and (b) would be more limited than under the second interpretation. In *Harrison v. Interstate Commerce Commission*, 211 U. S., 497, very similar provisions were construed as limiting the powers of the Interstate Commerce Commission in investigations to the purposes of the Act creating that Commission, which purposes the Court concluded *from the statute as a whole* to be the regulation of interstate commerce of common carriers. Therefore inquiries were held to be authorized only as to the affairs of such carriers relating to such commerce. In that case the Court was considering a statute under which the Interstate Commerce Commission claimed power similar to that claimed now by the Commission, namely, that it could make any investigation that it deemed proper, not merely to discover any facts tending to defeat the purposes of the Interstate Commerce Act but to aid it in recommending any additional legislation which it could conceive to be within the power of Congress to enact, and that in such an investigation it could with the aid of the courts require any witness to answer any question which might have a bearing upon any part of what it had in mind.

The investigation was started upon its own motion with no complaint before the Interstate Commerce Commission. A witness refused to answer questions as to whether he was interested in securities bought by a railroad company of which he was a director. The Interstate Commerce Act applied to common carriers in interstate commerce, required them to charge reasonable rates and otherwise

laid down rules for their governance and established the Interstate Commerce Commission with authority "to inquire into the management of the business of all common carriers subject to * * * this act" and to "keep itself informed as to the manner and method in which the same is conducted," with the "right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created" and "for the purposes of this act * * * to require, by subpoena, the attendance and testimony of witnesses and the production of papers relating to any matter under investigation." The Interstate Commerce Commission was specifically empowered to make recommendations to Congress concerning additional legislation which such Commission might deem necessary.

The Court held that the investigatory powers must be deemed to have been granted with the design of achieving the purposes of the statute—the regulation of interstate commerce carriers—and that inquiries must deal with violations of the statute. Three Justices dissented from the opinion that the witness need not answer but the dissent was on the specific ground that, as those Justices construed the statute, the questions related to a proper subject of inquiry, that is the relations of a director in an interstate carrier to such carrier. The dissenting Justices thus agreed with the principle of the majority, that the power to investigate must be deemed to relate to the other powers and to the purposes expressed in the statute.

The Court said (page 118):

"Whatever may be the power of Congress, it did not attempt * * * to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. * * *

"We are of opinion on the contrary that the purposes of the Act for which the Commission may

exact evidence embraces only complaints for violation of the Act, and investigations by the Commission upon matters that might have been made the object of complaint. As we already have implied the main purpose of the Act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; *in other words, the power to require testimony is limited, as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law.*" (Italics ours.)

Paragraphs (a) and (b) have been interpreted in accord with the *Harriman* case in every instance where the question has been presented to a court. In the *Basic Products Company* case, *supra*, the defendant urged the unconstitutionality of section 6 not only "in so far as it authorizes investigations and compulsory disclosure of matters which are beyond the commerce power of Congress," but also "in so far as it attempts to authorize a search or seizure by an administrative agency of the Government without charge or suspicion of wrongdoing." The Court said (page 482): "While the contention of counsel is probably sound, this court does not deem it necessary to go farther than to hold that the commission have not the power to carry on investigation which they have assumed in the present case."

In the case of *Federal Trade Commission v. P. Lorillard Co.*, 283 Fed., 999, in the District Court for the Southern District of New York, Circuit Judge MANTON was considering petitions of the Commission for mandamus for the production of records of certain tobacco companies in an investigation, at the direction of the Senate, into the tobacco trade. After quoting from the *Harriman* case, the Court said (page 1005):

"The Interstate Commerce Commission deals with quasi public corporations. But the phrase of

the Federal Trade Commission Act considered, in view of the language in the Harriman Case, would indicate that the right to procure information in its investigations under the provisions of section 6 would not grant the unlimited search and inspection of correspondence with the right to copy the same in the absence of some specific complaint which would point out the materiality to that complaint of the particular correspondence and papers sought to be obtained." * * *

"This command of the Constitution, properly interpreted, is a prohibition against Congress granting powers to the Commission for unlimited searches and seizures of letters and documents. The act makes plain the duty of the Commission to gather, compile, and publish for use in its proceedings what may be voluntarily offered or submitted in response to request or demand. It may also make investigation independently, but the exercise of visitatorial power over private corporations must keep within restrictions of the Fourth Amendment. 'Neither branch of the legislative department, still less any merely administrative body, established by the Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.' *Interstate Commerce Comm. v. Brimson*, 154 U. S. 478, 14 Sup. Ct. 1134, 38 L. Ed. 1047." * * *

"In other words, there must appear to be some reasonable cause for a search such as a definite complaint charging a specific wrong and thus presenting an inquiry which would have reasonable and readily ascertainable limits. Such a construction of subdivisions (a) and (b) of section 6 would effectuate the intent of Congress and the procedure can be kept within constitutional limits. *United States v. L. & N. R. Co.*, 236 U. S. 318, 35 Sup. Ct. 363, 59 L. Ed. 598; *Veeder v. United States*, 252 Fed. 414, 164 C. C. A. 338. Such a construction would seem to be in accord with the discussions in the Senate when this legislation was enacted. See 51 Congressional Record, pt. 13, 63d Cong., Second Session, pp. 12747, 12800, 12806-11, 12918, 12927. It was not intended to grant an unlimited power

of inquisition or an unlimited right of access to books and papers of private parties not engaged in any public service or a search without basis of some facts tending to establish a charge of wrongdoing."

In *Federal Trade Commission v. Baltimore Grain Co.*, 284 Fed. 886, District Judge ROSE, of the Maryland District Court, was considering a mandamus petition by the Commission to compel certain grain dealing corporations to produce all their records relating to their interstate commerce and their correspondence with jobbers during 1921. No complaint was pending. After suggesting that possibly the Commission might be authorized to make a compulsory examination of the papers of a corporation in the absence of a complaint of a specific violation of law, the Court pointed out that the statute itself limited investigations to the books of a corporation being "proceeded against" or "investigated." The Court suggested that the investigation was a scientific study of trade conditions and then proceeded (page 890) :

"Is there not a fair presumption that the investigation mentioned in the statute was one of another character than the one now being carried on, and that it was to be an inquiry into the way the particular corporation itself conducted its business, having as its substantial object the ascertainment of facts concerning that corporation, and as its ultimate end the possibility that in some way such corporate body might be required to mend its ways? If that be not the true construction of the act, and if it really means that, whenever the commission thinks best to make an inquiry into the way in which some great department of commerce is carried on, it may send its employees into the office of every private corporation which does an interstate business in that line, and empower them to go through the company's books, correspondence, and other papers, I am satisfied it goes beyond any power which Congress can confer, in this way, at least."

In the majority opinion of the Circuit Court of Appeals in the instant case the Court said:

"Common justice would seem to demand that before the business methods pursued by a corporation or an individual should be investigated, the party should be apprised either by a formal charge or by notice of the extent of the purposed investigation, in order that a day in court may be accorded. This is essential to determine whether the Commission is acting within its jurisdiction and to meet the charges preferred."

In *Maynard Coal Company v. Federal Trade Commission*, 48 Wash. Law Rep., 278, in the Supreme Court of the District of Columbia, the opinion in which was adopted by that court in the instant case, Mr. Justice BAILEY cited with approval the opinion in the *Basic Products Company* case, *supra*.

Unless paragraphs (a) and (b) express a purpose as well as powers the purposes of the Act are clearly the enforcement of section 5 and of the Anti-Trust Laws. Under the third construction, if the Act is not to be construed differently from the Interstate Commerce Act, the investigations of the Commission would be limited to such as may be required to insure compliance with section 5 and the Anti-Trust Laws. The Interstate Commerce Commission has regulatory powers, vastly greater than the Commission possesses, over all railroads engaged in interstate commerce and would appear to require greater powers of investigation than the Commission, yet this Court has deemed it the purpose of Congress to limit its powers of investigation to its requirements, namely, to match its powers of regulation. It is hardly conceivable that with the earlier statute and its interpretation before it Congress would not have clearly made known its intent to give unlimited powers of investigation to a new Commission entrusted with strictly defined substantive powers, corrective rather than regulatory, over a very limited subject matter.

**5. *The Construction by the Commission Is Not War-
ranted by Departmental Interpretation.***

In the Brief for Appellants reference is made to various reports published by the Commissioner of Corporations or by the Commission as evidencing the long continued construction of the Act and of the prior statute. It appears from the reports mentioned that they were based on information voluntarily furnished and that frequently information was refused.

It is argued on behalf of the Commission that Congress, fully aware of the construction given by the several Commissioners of Corporations to the Act creating the Bureau of Corporations, employed the same language as to investigations as was used in that Act adding to it the word "business" and that such action amounted practically to an express adoption by Congress of the construction previously given that Act by the Government. It appears however that the Committee which introduced the bill in the House of Representatives was not so certain as to the construction theretofore placed upon the sections of the Act creating the Bureau of Corporations which dealt with reports and investigations. That Committee in its report (Brief for Appellants, Appendix, paragraph 12) said:

"There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them."

Furthermore that Committee explained in the next succeeding paragraph just what was intended to be covered by the annual reports:

"13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the

country are provided for setting forth essential facts connected with the organization, stockholders, financial condition, and general business conduct of those concerns."

6. Consequences of Such Construction.

The consequences flowing from acceptance of the construction placed upon the paragraphs by the Commission are worthy of consideration in attempting to discover the purpose of Congress in enacting them. As to such consequences the language of the Court in the *Harriman* case is most apt (page 417) :

"Before taking up the words of the statute the enormous scope of the power asserted for the commission should be emphasized and dwelt upon. The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By Sec. 12 of the act of 1887, the commission has authority to require the attendance of witnesses 'from any place in the United States, at any designated place of hearing.' No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

"How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass

"it by. Whether Congress itself has the unlimited power claimed by the commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, 154 U. S., 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act."

It is true that as above indicated the statute involved in the *Harriman* case specifically gave to the Interstate Commerce Commission power to obtain information necessary to enable it to perform its duties and "carry out the objects" for which the statute was enacted and "for the purposes of this Act" to require testimony and the production of papers. It is also true that the section of such statute there considered has since been amended to broaden the powers of the Interstate Commerce Commission in respect of information which it may secure. Nevertheless even in its present form that section authorizes investigations and the procuring of information only in respect of matters having some proper relation to the purpose of the Interstate Commerce Act and to the subjects over which the Interstate Commerce Commission has jurisdiction.*

*Interstate Commerce Act, section 12 (24 Stat. L. 383, as amended by 25 Stat. L. 858; 26 Stat. L. 743). "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created;" * * *

"And for the purposes of this act the Commission shall have power to require by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." * * *

"The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer."

The consequences of accepting the construction placed upon the paragraphs by the Commission are indeed so enormous that they are suggested rather than indicated in the language above quoted from the *Harriman* case. The Commission claims the right to secure the information demanded in respect of prices, costs, production and capacity figures, orders, balance sheets, etc., on the alleged ground that such information has to do with commerce as defined in the Act. If it can be held that information of this character bears such relation to interstate commerce as to warrant Congress in requiring the production thereof, then clearly Congress can secure not only similar information but also different information of various kinds as to agriculture and all other industries. As we have pointed out above, the theory underlying this claim cannot be limited to information from corporations. The cost of production of steel by a corporation can have no greater relation to interstate commerce than the cost of production of grain by a farmer, and if the relation to such commerce is the basis for the procuring of information as to such costs such information would appear to be obtainable from individuals and corporations engaged in farming, stock or sheep-raising or any manufacturing or other industry the product of which is disposed of in part in interstate commerce. But, as this Court has pointed out in *Kidd v. Pearson*, 128 U. S., 1, at page 20:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce;

and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile v. Kimball*, 102 U. S. 691, 702, is as follows: 'Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests — interests which in their nature are and must be, local in all the details of their successful management."

**7. *Our Construction Is Supported by the
Other Sections.***

In the Act, sections 9 and 10, the Commission is given powers regarding the compulsory examination of witnesses and the production of evidence at least as broad as those conferred upon the Interstate Commerce Commission. If paragraphs (a) and (b) are deemed to confer independent powers having no relation to the general purpose of the Act, it must follow that the securing of information is one of the purposes for which the powers under section 9 were granted and that the authority of the Commission flowing from section 9 in any investigation under those paragraphs would be as extended as that of the Interstate Commerce Commission, the vast scope of which authority was pointed out by the Court in the *Harriman* case. That is, if one of the purposes of the Act is to have undefined investigations made under paragraphs (a) and (b), the Commission in making any such investigation can exercise all the powers granted by section 9, including that of summoning witnesses from any place in the United States to any designated place of hearing and requiring the production of such documentary evidence as it desires at such designated place, and all the powers of the Federal Courts can be used to enforce such authority of the Commission. It is stating it mildly to say that if Congress intended to confer upon the Commission such extraordinary powers over any corporation which may sell beyond state boundaries and without any limitation as to the subject matter upon which such corporation may be investigated, Congress was stretching its own authority to the utmost and might reasonably be expected to have set forth in the Act some purpose necessitating that such powers be conferred upon an administrative body.

The requirements of section 10 are particularly illuminating as to the matters in respect of which Congress intended to grant jurisdiction to the Commission. As above pointed out, that section makes it a penal offense, punish-

able by fine of not less than \$1,000 or more than \$5,000 or by imprisonment for one year or by both, to neglect or refuse to answer any lawful inquiry or to produce documentary evidence in obedience to the subpoena or *lawful requirement of the Commission*. It also makes it a penal offense, punishable by like fine or by imprisonment for not more than three years or by both penalties, (a) to make any false entry or statement of fact in *any report required to be made under the Act or in any account, record or memoranda kept by any corporation* subject to the Act, or (b) to neglect or fail to make full, true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of such corporation or (c) to refuse to submit to the Commission or any of its authorized agents for the purpose of inspection and the taking of copies *any documentary evidence of such corporation*.

If the scope of the Act is not limited to the interstate business of corporations this means that any corporation engaged in interstate commerce must keep for the Commission accounts, records or memoranda of all facts and transactions appertaining to any of the business of such corporation, and, furthermore, that any documentary evidence in relation to any of such business must at any time be submitted to the Commission or to any agent thereof. Unless Congress has power to control, and the right to examine all the books, papers, accounts and documentary evidence of, any corporation engaged in business of any kind which in any degree engages in interstate commerce, such requirements obviously are in excess of the power of Congress.

In the case of *United States v. L. & N. R. R. Co.*, 236 U. S., 318, involving a similar provision in the Hepburn Act referring to the documentary evidence of common carriers which should be subject to inspection by the Interstate Commerce Commission, this Court held that the terms "accounts, records or memoranda" at least

excepted correspondence files. It is not necessary for us to contend, and we do not contend, as intimated in the Brief for Appellants (page 16), that the power to regulate commerce extends only to the instrumentalities of commerce, but this Court has sufficiently distinguished the Congressional authority under the Commerce Clause over instrumentalities of commerce from its authority over other corporations. It has indeed been intimated "that there can be nothing private or confidential in the activities and expenditures of a carrier engaged in Interstate Commerce." *Smith v. I. C. C.*, 215 U. S., 33, at page 43.

If, in the statute affecting carriers, as to whose activities there may be nothing private or confidential to be withheld from Congress, this Court was unwilling to interpret such a clause as applicable to all papers in possession of the carrier, surely in the Act a like provision must be interpreted as applying only to those papers which deal directly with and have some legitimate bearing upon the interstate commerce of an ordinary manufacturing or trading corporation. Therefore the penalties proscribed in section 10 for offenses in connection with the papers which under paragraphs (a) and (b) and the other provisions of the Act can be examined at any time by the Commission must be deemed to apply not to all papers of any corporation which engages to any extent in interstate commerce but only to such of its papers as pertain to that interstate commerce. The powers of investigation and inspection granted by those paragraphs and enforceable by the provisions of section 10 must have some immediate connection with the interstate dealings of such a corporation. Certainly the costs of production, amounts allocated for depreciation, discounts on obligations, the tonnage capacity of a mill and the other information called for by the Commission have no such direct relation to interstate commerce as will warrant the application of section 10 thereto.

8. Our Construction Is Supported by the History of the Interstate Commerce Commission.

The Courts in such cases as that of *Interstate Commerce Commission v. Goodrich Transit Company*, 221 U. S., 194, have shown their desire not to limit the authority of the Interstate Commerce Commission or to question its exercise of discretion in investigations provided that the subjects of the investigation can be shown to have some material effect upon or relation to interstate commerce. The Courts have not, however, recognized in any case an unlimited power in the Interstate Commerce Commission to investigate any person or corporation upon any subject which such Commission might desire to investigate. The person or corporation being examined and the subject under investigation must in some manner be connected with the interstate commerce for the regulation of which that Commission was created. So, in the present instance, the powers under paragraphs (a) and (b) must, if they are not to be treated as an unlawful grant of unlimited power, be construed as applying to corporations and subjects having some relation to that freedom of competition in interstate commerce for the safeguarding of which the Commission was established.

This principle is exemplified in all the cases cited in the Brief for Appellants. The argument for the Commission is that the Constitution conferred all powers proper for the exercise of each power expressly granted and that among the powers so conferred is that of acquiring information. On this point the cases of *Interstate Commerce Commission v. Brinson*, 154 U. S., 447, and *Smith v. Interstate Commerce Commission*, *supra*, are cited and quoted from.

As pointed out in such Brief the Court in the *Brinson* case stated that the power granted to the Commission by Congress imposes upon anyone summoned the duty to appear and testify and produce the books, papers, etc.,

called for, if relating to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate and if the witness is not excused on some personal ground from doing what the Commission requires at his hands.

As quoted (page 26), the Court in the *Smith* case said:

"The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that [*Harriman* case] * * *. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We can not assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling."

It will be observed that these cases deal with the power of the Interstate Commerce Commission over carriers. It is unnecessary to do more than mention the obvious distinctions between the power of Congress over carriers, which are instrumentalities of commerce, and over manufacturing corporations, which are engaged in commerce only to the extent that they buy or sell some of their materials or products in interstate commerce.

In the Brief for Appellants the case of *In re Chapman*, 166 U. S., 661, is referred to as sustaining an Act of Congress providing for the punishment of a person who should refuse to testify when summoned as a witness before either House of Congress or any Committee of either House. As stated in that Brief (page 27) "the court was of opinion that where the subject matter was within the jurisdiction of the two Houses and the information demanded was pertinent to the subject it was competent for Congress to demand it."

It is unnecessary to discuss the cases cited from the State courts since they deal with the power of state legisla-

tures, which power is not necessarily akin to that of Congress, derived solely from the Constitution.

The Brief for Appellants in following up this argument falls into a curious error in stating (page 31) that "it is not conceivable that the Court will now hold that, despite the duty of Congress primarily to make this determination [whether the subject under investigation relates to interstate commerce or whether such subject has any effect upon interstate commerce], it can not procure the information on which to base its conclusions unless it is voluntarily produced". It is unnecessary for this Court so to hold or to hold that persons required to produce information by Congress may in each instance come to the Courts for a determination as to whether the information is indispensable to the legislative power, as queried in that Brief. It is asked (page 32) "Must Congress constantly resort to the courts for a determination of what is or what is not necessary to the proper exercise of a power conferred upon Congress by the Constitution?" The question to be determined is whether the information sought by the Commission in this case has such a relation to interstate commerce and concerns a subject having such effect upon interstate commerce that it can properly be brought within the purview of Congressional action. Presumably the Court will not undertake to decide in advance on what subjects Congress can properly legislate. In seeking information prior to legislation Congress, however, is not exercising its legislative power but, as pointed out in the Brief for Appellants, is exercising an implied power which affects directly the individual from whom the information is sought. The right of Congress to exercise such power directly affecting the rights of a citizen is necessarily in each instance subject to examination by the courts at the instance of the citizen regardless of the character of the information desired. Notwithstanding the completeness of the legislative power of Congress there can be no question that when Congress undertakes to exercise a power

affecting an individual citizen that citizen may have his rights determined by the courts.

9. *Our Construction Is Supported by the Decision in the Terminal Taxi-Cab Company Case.*

The *Goodrich* case above referred to is hereinafter discussed more fully. A case more nearly in point in the present connection is that of *Terminal Taxi-Cab Company v. District of Columbia*, 241 U. S., 252, involving the power of the Public Utilities Commission of the District of Columbia, which Commission, established by Act of Congress, was given authority to require reports and information from any public service corporation in the District. A public utility was obliged to obey "all lawful orders" of such Commission. Congress being the one legislative authority in the District, its power in the matter was not based solely on the Commerce Clause as in the other cases discussed. The Taxi-Cab Company was engaged in three kinds of business:

(1) Furnishing taxi-cab service, under contract with the railroad terminal authorities, for railway passengers using the terminal;

(2) Furnishing taxi-cab service to guests of various hotels; and

(3) Furnishing automobiles for use by individuals upon telephone calls to the central garage of the Taxi-Cab Company.

The Court held that as to the first two branches of its business the Taxi-Cab Company was a public utility and was required to furnish such information as the Utilities Commission might require in respect thereof. The third branch of the business, which produced about forty per cent. of the entire revenue of the Company, was held not to be business of a public character and as to such business the Court held that the Company need give no information to the Utilities Commission. In its decision the Court

emphasized the distinction between that case and the *Goodrich* case, pointing out that the interrelation existing as to the various enterprises of the Transit Companies in the *Goodrich* case was not present in the business of the Taxi-Cab Company. The Court said (page 256) :

"If we are right this demand was too broad unless the business from the garage also was within the act. There is no such connection between the charges for this last and the others as there was between the facts required and the business controlled in *Int. Comm. Comm. v. Goodrich Transit Co.*, 224 U. S., 194, 211, * * *. Although I have not been able to free my mind from doubt the Court is of opinion that this part of the business is not to be regarded as a public utility."

In the instant case Congress is not acting under its power over the District of Columbia or any other power but is limited to such authority as it derives from the Commerce Clause. In applying the Act to the appellees the Court must recognize that in this case there is no public service involved as in the *Taxi-Cab Company* case or in the *Goodrich* or *Harriman* cases. Notwithstanding the allegations of the Commission as to the public interest affecting the business of the appellees, Congress in the Act has not undertaken to impose upon corporations engaged in such business any of those obligations with which businesses affected with a public interest usually are charged and certainly Congress has in no legislation given to the Commission authority in its discretion to impose such obligations upon any corporation.

10. The Construction by the Commission Calls for Unprecedented and Unauthorized Power.

Such a power over corporations as the Commission claims has never yet been exercised by Congress and the Courts have uniformly refrained from recognizing the existence of any such power in Congress. The Commis-

sion, however, does not rest solely upon the existence of any general visitorial power in Congress but bases its claim upon the contention that, inasmuch as Congress has complete power to regulate interstate commerce, it can, in its unrestrained discretion, require any person or corporation desiring to enter into interstate commerce to comply with any conditions which it may desire to impose. (Record, pages 82, 83.)

This contention would appear to be sufficiently answered by the *Child Labor* cases (259 U. S., 20, and 247 U. S., 251) and the *First Employers' Liability* cases (207 U. S., 463). The former cases presented clearly the question of the extent of the power of Congress over corporations engaged in manufacturing products which are sold in interstate commerce, and the determination of the Court was, as in innumerable earlier cases, that until the products are shipped in interstate commerce Congress has no power over such products and that prior thereto it has none over the conduct of the corporations which send such products into interstate commerce. The *Employers' Liability* cases established that Congress cannot enact legislation not relating to interstate commerce but applicable to carriers merely because they are engaged in interstate commerce. The Court also definitely held in that case that Congress has no power to prohibit any person or corporation from engaging in interstate commerce except upon compliance with such terms and conditions as Congress may see fit to impose (page 502) :

"It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. *It assumes that because one engages in interstate commerce he thereby*

endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures." (Italics ours.)

The law on this point appears to be that every citizen must be left free to enter into any business, whether requiring that to some extent he engage in interstate commerce or not, subject it may be only to the power of Congress completely to forbid such business in objectionable commodities, such as lottery tickets, liquor or prize fight films, and to the absolute right of Congress to establish such regulations as it may deem proper affecting the interstate part of such business, provided that the regulations so established shall apply only to interstate commerce or to such intrastate matters as may also require regulation by Congress to avoid restraint upon or discrimination against interstate commerce. In the latter situation it may well be that the power of Congress is still more limited and that it may apply only to instrumentalities of interstate commerce like the railroads or to the intrastate affairs of a business in so far as used as a cloak against the effect of regulation by Congress of the interstate part of the business. However this may be, corporations as such are not as to all their affairs

subject to investigation by Congress and they are not otherwise brought within the jurisdiction of Congress merely through carrying on some of their business in interstate commerce and, therefore, paragraphs (a) and (b) must be interpreted as at least limited to authorizing the Commission to make investigations and require reports concerning the interstate business of corporations and such relations and practices of corporations engaged in interstate commerce as may affect interstate commerce. Such an interpretation is consistent, and it is obvious that it is the interpretation most consistent, with the spirit of all the other sections of the Act, all of which deal, as has been pointed out, with interstate commerce and particularly with violations of the Anti-Trust Laws, which laws apply and *can apply* only to interstate commerce.

Conclusion.

Paragraphs (a) and (b) must be interpreted in connection with the other provisions of section 6 and of the Act. As we have seen when so interpreted the power conferred thereby is a reasonable power and is subject to reasonable limitations. If the third interpretation be the correct one the power is limited to alleged or reasonably suspected violations of the laws over compliance with which the Commission has supervision.

It is apparent that, if the paragraphs are taken as conferring power in utter independence of the remainder of the statute, there are no limitations upon the power and no expressed purpose for such power, notwithstanding the fact that Congress has no general visitorial power over corporations whether engaged in interstate commerce or not. The Commission suggests that, inasmuch as under paragraph (f) of the section it is authorized to publish such of the information obtained as it shall deem expedient, it was therefore the intent in paragraphs (a) and (b) to procure information for the

purpose of publication. How strained such a construction is a casual reading of the three paragraphs discloses. There is absolutely no connection between (a) and (b) and (f), except in the discretionary power granted under (f) to make certain uses of information obtained under (a) and (b). The conclusion from such argument would be that Congress, deeming it possibly desirable that information be published, conferred upon the Commission absolute power to determine whether or not such publication was desirable and as a corollary gave it power to obtain all possible information from which it could pick and choose what to publish. Not only may this be an unlawful delegation of legislative power but aside from that the construction is so unreasonable as hardly to merit consideration.

THEREFORE THE CONCLUSION IS THAT THE ACT DOES NOT PURPORT TO, AND DOES NOT, GIVE THE COMMISSION POWER TO INVESTIGATE ALL THE BUSINESS OF ANY CORPORATION MERELY BECAUSE SOME OF ITS BUSINESS IS IN INTERSTATE COMMERCE.

C. The orders of the Commission to the appellees exceed the power granted to the Commission.

If the only grant of investigatory authority to the Commission is that contained in the Act and if the extent of the grant is measured by the purpose of the Act as a whole, then it is apparent that the Commission in the orders which the Commission has issued and the questions which it has propounded to the appellees has exceeded the powers contained in such grant. The Act as a whole unquestionably relates to interstate commerce and just as clearly to the prevention of violations of statutory enactments concerning conduct in interstate commerce embodied in section 5 and in the Anti-Trust Laws. In its answer the Commission clearly recognizes that the business of the appellees in production is not interstate commerce, although in the answer it is averred that the intrastate activities and the interstate business of the appellees cannot be separated, and it is also averred that if they were separated the information as to interstate business only would not be of use to the Commission, but no facts are alleged to support such conclusion. (Record, page 86.)

1. The Act Applies Only to the Interstate Commerce of Corporations.

In view of the fact that the Commission in its allegations recognizes the division of the businesses into (1) production or purchase of raw materials, (2) manufacture of finished products and (3) sale thereof, and considering also that the answer was specific as to the percentage (65% or more) of the total business done by each appellee in interstate commerce, the conclusion mentioned at the close of the last preceding paragraph is disproved by the allegations. The meaning must be that from the point of view of the Commission, considering the purpose for which it desires the information, the facts as to the intrastate features of the business, particularly as to the production of coal or steel products, are essential to the Commission. From

this it follows that the Commission requires information with some design having reference to profits and the relation between costs and selling prices, for only as to such matters would segregation be difficult. It may be granted that the selling prices of those products which are sold in interstate commerce are inevitably dependent upon factors involving to a degree the selling prices of those which are sold in the States where produced and that the cost of production of one part cannot accurately be determined separately from that of the other.

That the purpose of the Commission involves prices and profits is admitted in its answer. The Commission stresses the importance of the price of coal and steel upon the prices of food and other products and openly admits that the information is desired for the purpose of publication of facts for the use of the public and the other producers, of whom it is stated a large number had entered the two industries since 1917. (Record, page 88.) It appears, therefore, that the Commission has two things in mind, one having to do with industry and commerce as a whole and the other dealing with the particular industries involved, and in each case with particular interest in prices and profits.

As to the first point it is obvious that the desire of the Commission for complete information can not be satisfied by the appellees and other corporations engaged in the coal and steel business furnishing all the information which the Commission may ask for. The Commission still would have only incomplete information because it would have no facts regarding the retail trade in these or any other industries, regarding agriculture and other industries involving the production of other raw materials or regarding the innumerable branches of business involved in the exchange of goods between the producer of raw material and the ultimate consumer of finished products. All of this information should be obtained if the Commis-

sion is to have complete information, and publicity thereof, covering the entire commercial life of the country.

In the *Baltimore Grain Company* case, *supra*, as we pointed out above the Court for this reason questioned the power of the Commission to compel the production of evidence in such an investigation.

2. The Commission Can Not Regulate Prices.

As to the second point the Commission must show that it has received from Congress some power over prices of goods produced by *the two industries* involved before it can require, *in the absence of complaint involving prices*, information as to the elements upon which such prices are based. In the *Wolff Packing Company* case involving the Kansas Court of Industrial Relations, 262 U. S., 522; 67 L. Ed., 756, Mr. Chief Justice TAFT has distinguished three classes of so-called public businesses and has pointed out that the regulatory power of the legislature over such businesses differs in respect of the several classes. The regulation which was attempted in the business there involved was a regulation as to wages, which unquestionably would have effect upon prices. The Court held that, although the particular industry was that of meat packing and thus of the utmost importance to the State, the business was not affected with sufficient public interest to warrant the particular kind of regulation there attempted, the argument of the Court being that regulation of prices or the costs on which prices must be based is within the jurisdiction of the legislature only as to those businesses which in an exceptionally high degree are affected with a public interest. The business of manufacturing or of selling coal or steel products has never been declared by Congress to be affected with a public interest in any degree.

The following language used by the Court in that case is peculiarly appropriate in this connection (page 760, L. Ed.):

"In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people. The public may suffer from high prices or strikes in many trades, but the expression 'clothed with a public interest,' as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

• • •

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

• • •

"An ordinary producer, manufacturer, or shopkeeper may sell or not sell, as he likes (*United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 320, 41 L. ed. 1007, 1020, 17 Sup. Ct. Rep. 519; *Terminal Taxicab Co. v. Katz*, 241 U. S. 232, 256, 60 L. ed. 984, 987, P. U. R. 1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765); and while this feature does not necessarily exclude businesses from

the class clothed with a public interest (*German Alliance Ins. Co. v. Lewis*, 223 U. S. 289, 26 L. ed. 1011, L. R. A. 1915², 1159, 34 Sup. Ct. Rep. 612), it usually distinguishes private from quasi public occupations.

* * *

"To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

"If, as, in effect, contended by counsel for the state, the common railings are clothed with a public interest by a mere legislative declaration, which necessarily authorized full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be turning the public interest argument into the ground, to use a phrase of Mr. Justice BRADLEY when characterizing a similarly extreme contention. *Civil Rights Cases*, 100 U. S. 3, 21, 27 L. ed. 835, 838, 3 Sup. Ct. Rep. 18. It will be impossible to reconcile such result with the freedom of contract and of labor secured by the 13th Amendment."

Granting that the Commission has authority to make investigations to some extent into the business of corporations engaged in interstate commerce, it does not follow that the Commission has authority to investigate even such business in respect of matters over which the Commission has no power. There is no warrant in the Act or in any other legislation of Congress for the assumption of jurisdiction by the Commission in respect of fines charged by the appellation for their products and there can

be no question that the Commission has no control or authority in any respect over the prices of commodities whether sold in interstate commerce or not. The prices of goods sold in interstate commerce are in and of themselves no more the concern of the Commission than the ages or family relationships of the individuals who make the sales or purchases of such products. As Circuit Judge Harbo, subsequently a Justice of the Supreme Court, said in *In Re Harbo*, 32 Fed. cl page 112, a case involving an indictment under the Sherman Law:

"That Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the states, or the citizens of the states, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner, or owners, whether corporations or individuals." (Italics ours.)

This was quoted with approval by Mr. Chief Justice Waite in the dissenting opinion in which three other Justices concurred in the *Northern Securities* case, 193 U. S. 197, at page 204.

Under the principle enunciated in the *Harbo* case the Commission is limited in its investigations to corporations over which it has some jurisdiction and to the affairs of such corporations to the extent that the Commission has jurisdiction thereof. If it were alleged that the appellants were selling their products in interstate commerce at prices discriminating between different purchasers with the effect of substantially lessening competition or tending to create a monopoly in violation of section 2 of the Clayton Act or if the prices of goods sold by the appellants in interstate commerce were otherwise a proper subject of investigation by the Commission, it may be that the Commission could require information as to such prices

and, possibly, as to the prices of like goods sold by the appellees in the States where produced. In the absence of a complaint as to a violation of law in respect of prices or in respect of which prices are material, the Commission can not be entitled to information except as to interstate prices.

The cost of producing such goods, however, can have nothing to do with the discriminations in price against which section 2 of the Clayton Act is aimed. It is significant that in that very section it is provided that nothing therein contained shall prevent discrimination in price on account of differences "in the cost of selling or transportation or . . . prevent persons (defined in the Act to include corporations) . . . from selecting their own customers in bona fide transactions." *Nothing is said about costs of production, which of course have no relation to unlawful discrimination or monopoly.*

The Commission having no jurisdiction over the profits or prices of the appellees, even as to the prices of their products sold in interstate commerce, in the absence of any complaint or even of any allegation that the elements of such prices are in some manner involved in a violation of the laws regulating interstate commerce the Commission has no right to information as to the elements of cost entering into such prices, which elements relate to manufacture, and to commerce.

3. The Investigations Authorized Must Relate to the Purposes of the Act.

As to corporations engaged in interstate commerce the paragraphs give to the Commission power to examine into and require reports as to their organization, business, conduct, practices, management and relation to other corporations or individuals. Under section 5 it has authority to institute proceedings to prevent the use of unfair prac-

tices. Under paragraphs (d) and (e) of section 6 it has authority to investigate, when directed by the President or either House of Congress or requested by the Attorney General, alleged violations of the Anti-Trust Laws. It has power to enforce section 5 but not the Anti-Trust Laws. The reasonable interpretation of paragraphs (a) and (b), therefore, is that the power granted was in connection with the purpose of section 5, to be used when complaint was deemed unnecessary, and supplemental to the power under paragraphs (d) and (e). *Organization, management and conduct of business*, are the subjects of paragraph (c) and apply to violations of Anti-Trust Laws. *Practices* is the key word of section 5. *Relation to other corporations or individuals* might refer to the Clayton Act, the Sherman Act or to section 5. All the subjects of investigation are matters which may have to do with interstate commerce or violations of section 5 or of the Anti-Trust Laws. Neither under any of such subjects nor in relation to interstate commerce or the Anti-Trust Laws will information as to the capital structure, depreciation account, plant capacity, unfilled orders, costs of production or selling prices of any corporation have any pertinence.

4. The Act Does Not Authorize Investigations of Economic Conditions.

Except for the economic argument concerning supply and demand in the Brief for Appellants, the only justification which the Commission has offered for requiring reports as to the costs and other phases of the production of the appellees or of their wholly intrastate business or corporate affairs is that stated in the answer (Record, page 87) *that the purpose of the Act was to procure the recognized benefits of regulation through publicity of all facts as to entire trades and to submit to Congress recommendations for legislation.* In the lower Courts it was

argued that publicity of true facts would be valuable to those in the trade in that they could determine what products were profitable and whether there was overproduction or need for further production; that the figures produced could be used in settling wage controversies; that facts would be useful to capital seeking investment in that investors would know whether the field was inviting and needed capital or not and to the public in that it as well as the producers and sellers would know whether prices were reasonable or not and whether added legislation should be recommended. The Commission has not been established to supervise or regulate or assist investors in business subject wholly to State control such as the mining of coal and the manufacture of coke or steel nor has it been given any authority in respect of the relations between the appellees and their employees.

In the Brief for Appellants an effort is made to show that the information called for by the Commission is necessary to ascertain whether the normal relation of supply to demand in interstate commerce is being disturbed. An effort is also made to show the relation to interstate commerce of the different classes of information called for by the forms for reports submitted to the appellees. The discussion deals rather with economic and accounting problems than with law. The law of supply and demand is not based upon the Constitution and has not been established by any act of Congress. The Commission has no jurisdiction over it or any power to enforce it. Congress has legislated as to certain conditions which were deemed likely to interfere with the free play of competitive forces and no question is made by the appellees as to the right of the Commission to investigate any violation of such legislation which may be reported to it or which it may reasonably believe to exist. The Commission has not been constituted to maintain in operation any or all economic laws. As President Wilson in his

message to Congress of January 20, 1914, in response to which the Act was passed, said of the Commission which he proposed : The opinion of the country "would not wish to see it empowered to make terms with monopoly or in any way to assume control of business, as if the Government made itself responsible." The Committee in reporting the bill to the House said "The Commission has in no sense been empowered to make terms with monopoly or in any way to assume control of business. * * * There has been no attempt to deal with the question of maintenance of fixed prices. The Commission has been given no power to pass orders in any way regulating production." (Brief for Appellants, Appendix, paragraph 33.)

In the Brief referred to the purpose of the Commission is frankly admitted to be the making of an economic survey of business conditions, particularly as to prices in respect of what it calls necessities. That prices of commodities had enormously increased should be sufficient proof that the law of supply and demand or one or more other so-called economic laws were operative rather than any unlawful conduct in the steel or coal industry. If not, the fact that prices in general had enormously increased throughout the world should obviate any attempt at last to indict a whole people or any industry. If such conditions and the possible power of Congress to enact some legislation which in some manner might react on prices will warrant the prying into private affairs of manufacturing corporations here attempted, Congress must have power to compel the filing of reports by all citizens as to the amount of gold, silver, Federal Reserve Notes or other moneys possessed by them, since it can legislate concerning money. Congress has never attempted to exercise any such power of investigation and has not delegated such power to the Commission.

The entire argument of the Brief for Appellants on this point is to the effect that from the information demanded certain conclusions can be reached by economic reasoning as to the profitableness of the steel industry and that the Commission might conclude to make more specific inquiry into the circumstances of artificial market control if it should deem such control indicated. If such an investigation does not show that the Commission has assumed or intends to assume control of business it is that kind of a "fishing expedition" which this Court condemned in the case of *Ellis v. Interstate Commerce Commission*, 237 U. S., 434, 445. The Act clearly did not intend to authorize such control or any such expedition.

THUS, THE COMMISSION, NOT HAVING RECEIVED ANY POWER EXCEPT UNDER THE ACT AND BY THE ACT NOT HAVING RECEIVED ANY AUTHORITY TO MAKE SUCH AN INVESTIGATION AS IT HAS UNDERTAKEN TO MAKE, ITS ACTION IS IN EXCESS OF ITS AUTHORITY. IT CANNOT INVESTIGATE MANUFACTURE OR MINING.

II.

Congress could not grant to the Commission power to investigate the manufacturing activities of corporations which sell their output in interstate commerce.

In enacting the Act Congress was acting only under its power under the Commerce Clause of the Constitution. The Supreme Court has repeatedly declared that the powers of Congress and of the other departments of the Federal Government are enumerated powers and that no Federal authority has any power except such as is enumerated in the Constitution or must necessarily be implied as granted for the enforcement of some enumerated power. The Federal powers are thus different from those of any other sovereign state and are different also from those of the States of the Union, to which, or to the people, were reserved by the Constitution all powers except those specifically enumerated in the Constitution or so impliedly granted.

There is no specification of any such visitorial power over corporations as is sought to be exercised in this instance by the Commission and it therefore contended in the answer (Record, page 82) that the power of Congress to grant such authority is included in the general welfare provisions of the Constitution or in one or more enumerated powers. The phrase "General Welfare" occurs twice in the Constitution. It occurs first in the preamble but it is universally recognized that no grant of authority to Congress or to any other Federal body is contained in the preamble. *Jacobson v. Massachusetts*, 197 U. S., 11, 22. The phrase also occurs in the clause granting the taxing power but as there used it is not a grant of power but a limita-

tion upon the power granted, expressing merely one of the purposes for which Congress has authority to levy taxes. This was pointed out in *U. S. v. Boyer*, 85 Fed., 425, 431, where the Court quoted the opinion of Mr. Justice STORY, *Constitution*, Secs. 907, 908.

The Commission also claimed that the authority here sought to be exercised was granted under the power of Congress to take a census, to levy taxes or under its war powers. The Act does not, however, mention the census, taxes or war and it was adopted at a time when this country was at peace. There is nowhere in the Act any suggestion or indication of any kind that Congress was exercising any of such powers. It is not to be assumed that Congress enacts legislation merely in lusty exuberance of power and yet on the contention of the Commission Congress must have granted the authority claimed by the Commission for no particular purpose and with no design other than that of exercising its power to enact such legislation. The point hardly deserves argument since the mere reading of the Act shows a specific and proper design in keeping with the dignity of Congress so that it is entirely unnecessary to make any forced or unwarranted assumptions as to any fantastic purpose or lack of purpose on the part of Congress. The Act was adopted with a view to the regulation of interstate commerce and in the exercise of an unquestioned power to legislate upon interstate commerce. There is no doubt that under the Commerce Clause Congress has been given full and complete authority over the regulation of interstate commerce and, as the Act was enacted indisputably in the exercise of such authority, the question is, therefore, has Congress exceeded such authority.

A. The power of Congress over interstate commerce does not extend to manufacturing or mining.

1. The States Have Power to Regulate Manufacturing and Mining.

The power of the several States to regulate manufacturing and mining industries has been repeatedly declared by the courts to be supreme. In the case of *Kidd v. Pearson, supra*, a statute forbidding the manufacture of liquor within a State for other than certain specified purposes was sustained as not in conflict with the power of Congress to regulate interstate commerce, notwithstanding the fact that as interpreted and enforced by the State the manufacture within the State of liquor to be sold in interstate commerce was thereby prevented. In the case of *Heisler v. Thomas Colliery Co.*, 260 U. S., 245; 67 L. Ed., 119, the power of the State of Pennsylvania to levy a tax upon anthracite coal based upon its value when prepared for shipment was sustained over the objection of numerous other States which showed that over eighty per cent. of the coal was shipped in interstate commerce. In the case of *Oliver Iron Mining Co. v. Lord*, 262 U. S., 172; 67 L. Ed., 573, the Court sustained the power of the State of Minnesota to levy upon ore producers an occupation tax based upon the amount of iron ore produced, notwithstanding the admission that over ninety-nine per cent. of the ore so produced was shipped in interstate commerce for use in other States and that as a rule the mining of the ore consisted in dumping the ore by steam shovels or other means from open mines directly into railroad cars which when loaded were at once forwarded in interstate commerce.

Regarding the contention that because eighty per cent. of the coal was shipped to other States the tax interfered with interstate commerce, in the *Heisler* case the Court said (page 122, L. Ed.):

"The result would be curious. It would nationalize all industries; it would nationalize and with-

draw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to States other than those of their production."

In the *Oliver Mining Company* case, the Court said (page 576, L. Ed.):

"Mining is not interstate commerce, but like manufacturing is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * * The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved."

The converse of this is illustrated by the case of *Pennsylvania v. West Virginia*, 262 U. S., 553, 623; 67 L. Ed., 762, soon to be re-argued. In that case the Court held unconstitutional, because of its interference with the jurisdiction of Congress over interstate commerce, a statute of West Virginia which would require the withdrawal from interstate commerce for domestic use of natural gas which had entered the stream of such commerce.

The case of *Crescent Oil Company v. Mississippi*, 257 U. S., 129, presented the question whether a State can forbid a corporation engaged in manufacturing cotton

seed oil to operate any cotton gin in such State. The plaintiff was a corporation of Tennessee which in violation of the statute operated a cotton seed mill in that State and two cotton gins in Mississippi. The Court held that the manufacture of cotton seed oil and the ginning of cotton were not commerce and that an article in process of manufacture although intended for export to another State was not an article of interstate commerce and that, therefore, the State had power to legislate on the subject regardless of the interstate commerce power of Congress. The Court said (page 136) :

“When the ginning is completed the operator of the gin is free to purchase the seed or not, and, if it is purchased to store it in Mississippi, indefinitely, or to sell or use it in that State, or to ship it out of the State for use in another, and, under the cases cited, it is only in this last case and after the seed has been committed to a carrier for interstate transport that it passes from the regulatory power of the State into interstate commerce and under the national power.”

2. Congress Can Not Regulate Manufacturing or Mining.

The foregoing cases recognize that power over manufacturing and mining resides in the States. On the other hand power which Congress has sought to exercise under the Commerce Clause has been held to have been improperly exercised when the subject was manufacturing or mining. In the case of *United States v. E. C. Knight Company*, 156 U. S., 1, the Government endeavored to apply the Sherman Law to the purchase of stock in manufacturing companies. The Court said (page 11) :

“It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, ‘the power to govern men and things within

the limits of its dominion' is a power originally and always belonging to the States, not surrendered by them to the general Government nor directly restrained by the Constitution of the United States, and essentially exclusive. * * *

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general Government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it."

The Court, therefore, held that the transaction was not within the statute and was not subject to any power which Congress could exercise.

It is argued in the Brief for Appellants that the power of Congress to regulate interstate commerce extends to all matters which may burden or restrain such commerce even though not actually a part thereof and attention is called to the decrees of this Court in dissolving combinations of manufacturing companies in the *Standard Oil Company*, *American Tobacco Company*, *International Harvester Company* and *Reading Company* cases. In each of these cases the Court found, in substance, that manufacturing companies had, through various methods,

formed combinations with the purpose and effect of restraining interstate commerce in their products, thus differing from the *Knight* case, *supra*, as made out by the Government. It would, of course, have been useless in any of these cases to decree that the combination might retain the unified control of production which had been unlawfully acquired and to decree merely that separate selling organizations should be re-established. We have no doubt that if the purpose of the combination in any of these cases had been to effect a monopoly the defendants would have welcomed a decree permitting them to retain control of production.

The effect of such control upon interstate commerce in the sale of the output would, of course, be immediate and direct and therefore such improperly acquired control was clearly within the jurisdiction of Congress and the only feasible method by which the courts could re-establish competitive conditions was to require that the influence as affecting interstate commerce should be separated. This, however, was not, and was not intended by the courts to be, a recognition of any power in Congress to regulate production or corporations engaged in production. The right which the courts were enforcing was the right to regulate interstate commerce and any artificial condition burdening or interfering with the freedom of such commerce. The situation obviously is entirely different from that of twenty-two independent corporations against which there is no suggestion of collusion or combination and which are actively engaged in competition in the sale of their products. The fact that the rise and fall in prices charged by one or more of such competitors may have some effect upon the quantities sold by them in interstate commerce is obviously not such an effect as brings the manufacturing of such product within the jurisdiction of Congress, otherwise Congress must have power over the production, transportation and sale of every commodity sold in this country, since every sale must have some influence on the national market for commodities.

3. Congress Has Power to Control Discrimination in the Freedom of Commerce.

This Court made clear the proper distinction in *United States v. Winans*, 19 Wm. & Wm. Co., 200 U. S., at page 110:

"The distinction between the *Factor* case and that of *Wagon & Locomotive v. United States*, 200 U. S., 105, illustrates a distinction to be drawn in cases which do not involve interstate commerce directly and which may or may not be regarded as affecting interstate commerce so directly as to be within the full and exclusive power. In the *Wagon & Locomotive* case, the question was whether a State could tax the business of a trader dealing in commerce for the future delivery of cotton whose there was an obligation to ship from one State to another. The tax was sustained and dealing in cotton business was held not to be interstate commerce, and yet throughout such dealings in cotton business as were alleged in the *Factor* case where they were part of a conspiracy to bring the cotton within reach within its influence, was held to be in substance an interstate commerce. And so in the case at bar, coal dealing is not interstate commerce and abetting it is not aiding, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce where the distinction is resting is attributed to interstate commerce as it is here. Surely such a direct, substantial and substantial effect is sufficient to show the direct substantial effect is sustained."

In the case *Englewood Lumber Co. v. United States*, supra, the Court held unconstitutional a statute passed by Congress regulating the business of carrying on the common carriers from engaged in interstate commerce upon the ground that the statute applied to all common carriers engaged in interstate commerce and abetting in carrying them

relations with their employees whether or not employed in interstate commerce. After the decision of these cases Congress enacted a new statute which was sustained by the Court, the objection to the former statute having been eliminated by making the regulation applicable to common carriers only to the extent that they were engaged in interstate commerce.

Congress in the *First Child Labor* case, *supra*, endeavored, through the use of its power to regulate interstate commerce, to forbid the shipment in interstate commerce of the products of child labor in manufacture. That law having been declared unconstitutional, Congress endeavored, in reliance upon its power to levy taxes, to achieve the same result, that is, to prevent the sales of products of child labor in manufacture. In each instance the Court held the statute to be unconstitutional because it involved a regulation of manufacture, over which Congress had no jurisdiction.

In the case of *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S., 211, the Government had secured an injunction under the Sherman Act to restrain manufacturers of iron pipe from acting under agreements in restraint of trade and commerce. Although the Court sustained the decree, as unquestionably warranted by the evidence of agreements to restrain interstate commerce, it ordered the decree modified so that it should not apply to such agreements in so far as they related to commerce wholly within a State.

If, therefore, as necessarily follows from these cases, the power of Congress over interstate commerce does not apply to the appellees since they are engaged in the mining of coal or ore and the manufacture of coke, iron and steel, Congress could not give to the Commission any power over these corporations since, of course, its subordinate authority can have no greater power than Congress itself has.

4. *The Decision in the Stockyards Case Was Based Upon Such Power.*

The Commission lays great stress upon the decision of the Supreme Court in the case of *Stafford v. Wallace*, 258 U. S., 495. In that case the Court was considering a statute providing for the supervision by Federal authority of the business of commission men and live-stock dealers in the great stockyards of the country. The Court sustained the act as a valid exercise of power under the Commerce Clause because of the direct effect of the transactions of the commission men and the live-stock dealers upon interstate commerce in live-stock and because the relations existing, or which Congress reasonably could have deemed to exist, between the commission men and live-stock dealers and the packers who purchased the greater part of the live-stock sold by the commission men enabled, or were reasonably deemed likely to enable, the packers unreasonably to restrain the freedom of interstate commerce in live-stock.

The Court emphasized the fact that the stockyards are not places of final rest for the commerce in question. This of itself is a sufficient basis for distinguishing that case from the present case. The mining appellees are engaged in interstate commerce only to the extent that their products when mined and the coke when manufactured therefrom are shipped in interstate commerce. The steel manufacturing appellees are engaged in interstate commerce to the extent that their raw materials come to them in varying measure through the channels of interstate commerce and to the extent that some of their finished products are sold and shipped therein. The mine is the place of origin of the ore and coal entering interstate commerce and is, of course, not an intermediate place of transitory stoppage. The coke or steel manufacturing plant is unquestionably the terminus of the interstate commerce in the raw materials used by it and the place

of origin of the products which it ships in interstate commerce, which are entirely different from the raw materials and represent a complete mutation of character. The separation between manufacture and sale is admitted in the Brief for Appellants (page 63): "The commodity may be made long in advance of an order, it may be (as is especially true for pig iron and semi-finished steel) indeterminate with respect to what final sales product it will be converted into." In so far as the appellees are engaged in interstate commerce, they are so engaged in two entirely separate transactions and it cannot be said that a steady stream of interstate commerce is passing through their plants as in the case of the stockyards.

The cases are further distinguished by the absence of any suggestion of direct effect, lawful or unlawful, upon interstate commerce or of any burden imposed thereon by the appellees as in the *Stafford* case.

Commerce in live-stock as at present conducted has this distinguishing characteristic which the Court clearly had in mind: cattle are grown in and shipped from many States by vast numbers of individuals who have on the whole a comparatively limited market and cattle ultimately reach the consumer in the form of meat products, which have been prepared by a comparatively small number of packers. Thus, on the one hand are great numbers of producers and on the other the entire community as consumers with the traffic to a large extent flowing through a comparatively small number of packers. Thus control over the commerce is or may be centralized in a few hands. Moreover, the facilities for handling the cattle are stockyards in a very few of the larger cities of the country. Upon these stockyards presses constantly a mass of cattle which must immediately be disposed of and got out of the stockyards, and the packers themselves who receive the larger part of this mass must, notwithstanding modern storage facilities and methods of treat-

ing meat products, rapidly dispose of this mass of cattle. There is thus from the necessity of the case this possibility of centralized control over the commerce and, on the other hand, the urgency of the flow from the point of view of the producer, the stockyards, the packer and the consumer. Any interference in the stockyards with the flow of this stream in the opinion of the Court would directly burden the commerce in live-stock and meat products.

In the case of coal there are vast numbers of producers but an individual producer can control his production to a far greater extent than can a grower of live-stock. The market for coal is world-wide and the producer is not required, as is the cattle grower, to ship to a limited number of markets. In the case of the appellees their coal production does not even reach the market since each producer produces only for his own use in manufacture. The same situation applies in respect of ore. A mine owner can permit his ore to lie in the ground from one year to another and is not under the necessity of disposing of his ore at particular periods as is the cattle grower when his cattle reach a certain age. There is no point in the passage of coal or ore from the producer to the consumer of the ultimate steel product at which the streams of raw materials congest as in the case of the stockyards.

In the case of *Board of Trade v. Olsen*, 262 U. S., 1; 67 L. Ed., 519, which involved the constitutionality of a statute for the regulation of transactions on grain futures exchanges, the Court sustained the power of Congress to regulate such transactions because they were deemed to be incidental to, and to have the possibility of unduly burdening, the constant stream of interstate commerce in the grain dealt in on such exchanges.

Not only, therefore, do these two cases not furnish any support to the contention that Congress by the Act properly gave to the Commission jurisdiction over the appel-

lees not limited to their interstate commerce, but on the principles on which those cases were decided, it must be clear that Congress has no jurisdiction over the general business of the appellees and therefore did not and could not give any such authority to the Commission. In each instance the business the regulation of which was authorized by Congress was a business which in and of itself had previously been held by the Court not to be interstate commerce. Owing to the peculiar circumstances affecting each business, Congress then declared that as conducted those businesses were directly burdening interstate commerce and were so intimately related with the commerce in grain that the businesses should be regulated like public utilities. The Court, although it has frequently stated the law to be that the legislative authority cannot by fiat make over a purely private business into one affected with a public interest and therefore subject to regulation, held that in these cases the circumstances were such as to warrant Congress in treating the businesses as affecting the public interest and hence subject to regulation, which regulation was held to be properly that of Congress owing to the direct relation between the business and interstate commerce.

The Act does not apply specifically to mining or to the manufacture of coke or iron or steel and Congress in this or any other statute has not endeavored to declare that such businesses are public utilities. Hence the basis of the authority of Congress to regulate which was found in the *Board of Trade* and *Stafford* cases does not exist in the present case and any regulation as to these businesses cannot be deemed a precedent warranting the exercise of such regulatory power over the appellees.

THE COMMISSION, THEREFORE, HAS NO POWER TO REQUIRE INFORMATION AS TO MANUFACTURING OR MINING.

B. Although the Commission may have investigatory power over such business of the appellees as is interstate commerce this does not give it such power over their other business.

It is contended that inasmuch as the statute clearly confers upon the Commission certain regulatory power over corporations engaged in interstate commerce at least as to such commerce, as regards unfair methods of competition for instance, and in connection therewith investigatory powers, then the Commission must have authority to investigate all the business of such corporations, particularly in cases where, as is alleged to be the situation in this case, the businesses are inextricably intermingled. In the answer it is urged that the power of Congress over interstate commerce is complete and that, therefore, it can exact any desired terms from any corporation engaging in such commerce and that this was indisputably true where the two phases of the business of a corporation are so closely related that Congress cannot effectively regulate the interstate business without regulating the intrastate business. Great reliance as to this contention was placed upon the case of *Interstate Commerce Commission v. Goodrich Transit Company*, *supra*.

In that case the Interstate Commerce Commission was endeavoring to procure from the Transit Companies information in many respects like that required in this case by the Federal Trade Commission. The Transit Companies operated a line of vessels on the Great Lakes which transported passengers and freight from port to port within single States and from a port in one State to a port in another State and a substantial part of its business consisted of such freight transportation on through shipments received from or delivered to railroads under joint through rate arrangements and through ticket passenger traffic. One of the Transit Companies also owned

and operated several amusement parks. The Transit Companies contended that although Congress might have endowed the Commission with authority to procure information as to the traffic under joint arrangements with the railroads it had not given and could not give the Commission any authority to require information as to any other business of the Companies.

The Court answered this contention by pointing out that the Companies were unquestionably within the class of companies to which the Act applied and that there could be no doubt that the Commission had authority to require information as to the interstate business of companies in that class. The Court also held that inasmuch as the Commission had such authority, *although it had no regulatory authority over the other business of the companies*, it could in the circumstances require such information thereon as was necessary to prevent the use of such other business and the accounts thereof in concealing practices and information concerning the interstate business which the Commission did have power to regulate. What the Commission was interested in particularly was the matter of rates and clearly when the same facilities of a company are used in transporting interstate traffic as in transporting that which does not cross any State lines the Commission cannot determine the reasonableness of any rate in interstate commerce unless it does have full information as to the entire business of such company, and for this purpose it was held to have authority to require accounts to be kept in a specified manner and regular reports to be made covering all the business of the Transit Companies.

It is clear from this very case that the Court was not extending the power of the Commission over business not within the jurisdiction of Congress under the Constitution. It was not authorizing an inquiry into intrastate business merely because conducted by a corporation en-

gaged in commerce. The Court was of opinion that the business of the Transit Companies was such that, the Companies being under the jurisdiction of the Commission as to certain matters and particularly as to their rates and charges, the Commission was entitled to full knowledge as to their entire business affecting such matters, because that was necessary to prevent that part of the business which in and of itself was outside the jurisdiction of the Commission from being used to conceal unjust discriminations and violations of rate regulations in that part of the business which in respect of such matters was within the jurisdiction of the Commission. As above pointed out the Court in the *Terminal Taxi-Cab Company* case, *supra*, indicated the necessary relationship between the various businesses of the Transit Companies which required the investigation authorized in the *Goodrich* case and in the absence of such relationship reached a different result in the *Taxi-Cab Company* case.

It will be observed that the Court in the *Goodrich* case took judicial notice of the character of the several kinds of business of the Transit Companies and that it considered that such character would not permit the businesses to be segregated and that information as to a part of the business could not be complete as to such part without information as to the remainder. Such clearly is not the case in the cause at bar. As we have shown above, the interstate commerce of the appellees is limited to the purchase and shipment of some raw materials and the sale and shipment of some finished products in interstate commerce. Not only is it so clear as to require no argument that the manufacturing of coke or iron or steel or the mining of coal or ore is not inseparably connected with the purchase and shipment of ore and coal or the sale and shipment of coke or iron or steel products, but there is the further distinction that there is no relationship of rates or prices in this

case as in that. The selling price of coal or ore or steel products within a State does not have any relation to the price thereof when sold for shipment out of a State and the Commission admits that the commerce in steel disregards State lines. (Brief for Appellants, page 61.) This, of course, does not mean that in case of any alleged violation of section 5 or of any of the Anti-Trust Laws the Commission cannot, if price be involved, inquire into and require information as to the prices of such commodities in intrastate commerce if they are affected by or if they affect interstate commerce and prices in interstate commerce. In this case, however, which involves no complaint on any score against any of the appellees, this question does not arise and the Commission cannot, therefore, rest its case in any degree upon the *Goodrich* case.

We have already shown that Congress has no authority to establish any arbitrary conditions as a prerequisite to the entry of any corporation into interstate commerce. This being true, it may be admitted that the power of Congress over interstate commerce is as full and complete as the Commission contends if by this is meant that in the exercise of its lawful authority over interstate commerce the power of Congress is subject to no limitation other than the limitations prescribed by the Constitution and that no State or other authority can interfere with or infringe upon the prerogatives of Congress in respect of such commerce.

In this connection it should be observed that, as appears from the bill of complaint, one appellee produces pig iron and sells fifty per cent. of its total production in the State of Pennsylvania, where its plants are located; that another appellee produces pig iron in the State of Pennsylvania and sells about eighty per cent. of its output in that State; that a third appellee mines coal and manufactures it into coke and sells its entire product in the State of

production. As to these appellees the Commission averred on information and belief that the greater part in both quantity and value of purchases and sales made by each is in interstate or foreign commerce. These appellees are excepted from the allegation in the answer, on information and belief, that the appellees make sixty-five per cent. or more of their sales in interstate or foreign commerce. There is no indication anywhere in the amended answer or in any of the briefs filed on behalf of the Commission that the Commission will not require, or that it has any doubt as to its right to require, the desired information from these three appellees although their allegations as to the sale of their products in the State of production were true.

Indeed from the arguments in the answer it is apparent that the demand of the Commission for the required information is based not upon the fact that the output of any appellee enters interstate commerce but upon the theory that Congress has unquestionable authority to legislate concerning, and to acquire any desired information in respect of, any industry the products of which have a national market. In the Brief for Appellants this argument is not so openly pressed but the theory of the Brief is essentially the same, that Congress can authorize the Commission to gather information if Congress *can* use such information in any legislation (pages 21 and 44) and because some sales are made in interstate commerce all sales and factors entering into prices can be investigated (page 61). It will be recognized that the argument that the Act need not be based on the power of Congress over interstate commerce but is within the tax, tariff, census or some other power of Congress carries the implication that Congress could empower the Commission to require information from any individual or corporation although the grant as limited is to be exercised only in respect of corporations in interstate commerce.

The Supreme Court has said in as recent a case as the *Wolff Packing Company* case, *supra*, which was decided in June of the present year (at page 759, L. Ed.,) that an ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes. In that case the Court was dealing not with the power of Congress over interstate commerce but with the power of a State over a business which admittedly was in the power of the State to regulate although not subject to the kind of regulation which the statute endeavored to impose. The case thus rests upon the principle that regardless of the completeness of the power of regulation, whether in Congress as to interstate commerce or in the States as to intrastate commerce, there are limits beyond which regulation can go only upon certain conditions and in certain cases.

Moreover as the Court has pointed out in the *Gasoline Pump* cases, 261 U. S., 463; 67 L. Ed., 483, involving complaints brought by the Commission against various oil corporations in respect of leases of gasoline pumps to retail gasoline dealers (page 488, L. Ed.,) :

"The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called 'competition.' The great purpose of both statutes (the Clayton Act and the Federal Trade Commission Act) was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

When this statement is considered in connection with the statement of the Court in the case of *United States v. Colgate & Co.*, 250 U. S., 300, at page 307, that

"In the absence of any purpose to create or maintain a monopoly the (Sherman) Act does not restrict the long recognized right of trader or manufacturer

engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.”

it is apparent that the Supreme Court has not yet recognized any authority in the Commission to regulate business, even in interstate commerce, except in respect of securing obedience to the laws heretofore enacted by Congress to secure freedom of interstate commerce and as above pointed out there is no legislation by Congress on the statute books establishing or regulating the prices at which the appellees or other ordinary merchants or manufacturers shall sell their wares. Having no regulatory authority as to prices the Commission, in the absence of a complaint involving prices, has therefore no power to require information concerning the costs upon which such prices may be based.

That the Commission has absolutely no authority over prices, even of goods sold in interstate commerce, has been expressly held by the Circuit Court of Appeals for the Second Circuit in a case in which certiorari was refused by the Supreme Court, *The Mennen Company v. Federal Trade Commission*, 288 Fed., 774. In its decision in that case wherein it reversed a “cease and desist” order of the Commission the Circuit Court said (page 781) :

“ * * * We have no doubt that the Mennen Company had the right to refuse to sell to retailers at all, and if it chose to sell to them that it had the right to fix the price at which it would sell to them, and that it was under no obligation to sell to them at the same price it sold to wholesalers.”

In the case of *United States v. Freight Association*, 166 U. S., 290, the Supreme Court used the following language (page 320) :

“The trader or manufacturer * * * carries on an entirely private business, and can sell to whom

he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction."

Except in so far as the law has been changed by section 2 of the Clayton Act and by section 5 of the Trade Commission Act that statement expresses the law as it is today and neither of those sections makes any change as to price or confers any jurisdiction upon the Commission as to price except in respect of discriminations which may tend to interfere with the freedom of interstate commerce.

As was again recognized in the *Wolff Packing Company* case, *supra*, businesses of the character of those conducted by the appellees are entirely private businesses. They are, therefore, not subject to any jurisdiction of the Commission in respect of prices, not only because Congress has given no such jurisdiction to the Commission but also because Congress had no power to give any such jurisdiction to the Commission. Hence prices can be investigated only as facts bearing upon some phase of interstate commerce. In this case interrogatories deal with intrastate, manufacturing, facts bearing upon prices.

THE COMMISSION COULD NOT BE GRANTED POWER TO INVESTIGATE THE INTRASTATE BUSINESS OF THE APPELLEES.

C. Neither Congress nor the Commission has any power to require information on any matter over which it has no regulatory power.

The Constitution of the United States recognizes what is one of the fundamental principles of the common law.

that the papers and the personal effects of the citizen should be secure from official intrusion except under proper legal authority. Hence, it is a generally recognized principle that no governmental authority has power to investigate the private affairs of citizens except in respect of some matter over which such authority has jurisdiction. The rights of a corporation in this respect differ from but are governed by the same principles as those of an individual. The State which has created a corporation is commonly said to have a general power of visitation over such corporation because the corporation exists by the favor of the State and the State has the right and power to ascertain how its creature is exercising the privileges granted to it by the State.

The Federal authority over corporations created under Congressional sanction is probably the same as that of a State over corporations organized under its laws. The courts have gone no further, however, in respect of Congressional power over State corporations than to recognize a power in Congress as complete as that in the States in respect of inquiries as to obedience to those Federal laws to which a corporation may be subject. It cannot reasonably be assumed that Congress delegated the right to procure any desired information from corporations as a substantive purpose and power. The provisions of the Act concerning investigations and procuring of information must be construed in connection with the purposes of the Act for the achievement of which the information is to be acquired. Consequently, the information which can properly be acquired must have to do with the purposes of the Act and bear some relation either to regulation of interstate commerce or to some violation of the laws for the enforcement of which the Commission was established. The contention of the Commission that the procuring of information is not regulation is rather ingenuous in view of the insistence by the Commission upon the effectiveness of

regulation by publicity and upon its right to acquire information for the purpose of publication.

Stress is laid by the Commission upon the statement of the Court in the *Goodrich* case, *supra*, that the requiring of information concerning a business is not a regulation of that business. What the Court was considering in that case was the contention of the companies that the Interstate Commerce Commission had no power to regulate that part of the business of the companies which was not interstate commerce and the statement of the Court meant that, granted that the Commission had no authority to regulate such business, *per se*, it could in the circumstances of that case require information as to such businesses because such requirement would not be a regulation but would produce information affecting that which could be regulated. The Court did not hold that the Commission had authority to require information from the Company as to matters in respect of which the Commission had no power to deal. In fact the principle on which the case was decided is a recognition that the right to require information must be coupled with the right to take action in respect of the information procured, that is, that the information as to the amusement parks owned by the Transit Companies was properly required because the Commission could have taken action in respect of the amusement parks and the financial arrangements of the Transit Companies therewith if such arrangements were used by the Transit Companies to cover any violation of the laws which the Commission was authorized to enforce in respect of the interstate commerce of the Companies.

In the *Harriman* case, *supra*, the Court refused to recognize any power in the Commission, in an investigation which admittedly the Commission was empowered to conduct, to require information from a witness as to matters not involved in any subject over which the Commission had jurisdiction.

In the case of *Hale v. Henkel*, 201 U. S., 43, the Court quoted (page 72) the following language, with no evidence of disagreement, from the *Brimson* case, *supra* :

"It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements and documents *relating to any matter legally committed to that body for investigation.*"

As the Court said in the case of *Ellis v. Interstate Commerce Commission*, *supra*, where the Court was considering the right of the Interstate Commerce Commission to investigate the affairs of a corporation not a common carrier (page 445) :

"The Armour Car Lines not being subject to regulation by the Commission its position was simply that of a witness interested in but a stranger to the inquiry, and the Commission could not enlarge its powers by making the company a party to the proceedings and serving it with notice."

In that case the Court refused to require a corporation to answer questions on matters relating to that corporation as to which the Commission had no jurisdiction although it did permit inquiry as to certain matters over which the Commission did have jurisdiction.

In the case of *Terminal Taxi-Cab Co. v. District of Columbia*, *supra*, the same principle was applied.

As above pointed out, in every case in the lower courts where the Commission has endeavored to require a corporation to divulge information regarding its intrastate business it has been held that the Commission had no such authority.

All these cases illustrate the principle that the investigatory power can be used only in relation to a subject of possible regulation. As we have shown the subject mat-

ter of the inquiry is not subject to regulation by the Commission or Congress.

HENCE NEITHER THE COMMISSION NOR CONGRESS HAS ANY POWER TO INQUIRE INTO THE AFFAIRS OF THE APPELLEES NOT DIRECTLY RELATED TO SOME PHASE OF INTERSTATE COMMERCE OVER WHICH THE COMMISSION OR CONGRESS HAS REGULATORY POWER.

D. The inquiry of the Commission does not relate to interstate commerce.

In the Brief for Appellants (page 80) it is admitted that the inquiry of the Commission constitutes an investigation rather than the requirement of reports. The Commission realizes the difficulty of bringing its action within the language of the Act since what it required was not an annual or a special report but regular monthly reports although in the Brief it is naively suggested that as a matter of law the order to furnish monthly reports was merely a notice that a report at the end of each month would later be called for.

The kind of report which Congress authorized the Commission to require is indicated in the report of the House Committee (Brief for Appellants, Appendix, paragraph 16), which speaks of compulsory publicity of an abstract of the annual and special report of each corporation which, in the bill as introduced, was required to be included in the annual reports which the Commission was to publish. Although the Act does not contain the provision of the bill that abstracts of such reports from each corporation should be included in the annual report of the Commission, it does authorize the Commission to require an annual report from every corporation engaged in commerce and special reports,

presumably supplemental thereto, if such should be deemed necessary. Such reports are to be annual or special reports "or answers in writing to specific questions" in reference "to the organization, business, conduct, practices, management and relation to other corporations, partnerships and individuals * * *". There is no indication in the Act or in the bill as introduced that Congress had any intention of authorizing the Commission to require current reports of all the business operations of all the corporations in a particular industry. Inasmuch as the Commission tacitly admits this and treats its demands for reports as an investigation, it follows that paragraph (a) is involved in this cause rather than paragraph (b).

The Commission also seems to realize, however, that its power to investigate must be exercised in respect of subjects over which it has some authority or in respect of which Congress can legislate and, since the Commission recognizes that it has no authority over the business of the appellees which is not interstate commerce and that Congress cannot legislate in respect of such business, it suggests that of necessity it has authority to procure such information in order that Congress may be advised whether proposed legislation will affect interstate or intrastate commerce of the appellees. Such a contention, it is apparent, argues the Commission out of court because, as it admits that its investigatory authority is limited to that field over which Congress can legislate, it must admit that it has no power to require information concerning other subjects as to which it does not know whether or not Congress can legislate. The power of Congress over the subject matter must first be established before the investigatory power of the Commission can function. This clearly must be so, for there is no limit to the investigatory authority of the Commission if it can require the production of any information which it demands in order that, having acquired such information, it can then determine whether or not

such information is of the character which it has authority to acquire and in respect of which Congress can act.

The dilemma in which the Commission finds itself compels it to base its claims on an argument in economics rather than in law, and as above pointed out Congress has no authority to maintain any economic law, its province being, in respect of interstate commerce, to enact such legislation as it may deem proper to govern the conduct of those who are subject to the play of economic forces. It is not contended, of course, that Congress has exhausted its power of legislation or that, if the economic views of Congress shall change, it cannot enact legislation affecting interstate commerce in order to limit the free operation of economic forces, contrary to the design of the existing legislation. What we contend is that the power of the Commission must be sought in the Act rather than in the economic views of Congress or the Commission and that **any proceeding by the Commission must find its warrant in some Act of Congress and not in any economic law.**

The information demanded by the Commission, as is clear from the argument under Point IV of the Brief for Appellants, concerns the economic conditions under which the entire steel industry, and in fact all industries, were operating in the year 1920, rather than any transaction or series of transactions in interstate commerce by any of the appellees, or the effect of any such transaction in respect of any legislation of Congress. The theory on which the argument is based seems to be that the legislation of Congress as to interstate commerce may change as economic conditions change, and that therefore the Commission is authorized to acquire any desired information regarding economic conditions. It is true that Congress must legislate in the light of economic conditions existing or expected, but it is also true that the legislation which Congress can enact will deal not with such conditions but with the conduct of businessmen as affected thereby.

The investigation concerns prices. It is admitted that the Commission has no jurisdiction over prices since it offers the omission from the Act of any provision therefor as an argument for the validity of the Act. (Brief for Appellants, page 70.) *This very admission, however, is embodied in an argument that it can influence prices by publicity.* No one can complain if in some manner through publicity prices are reduced by some competitors. That would be the result of the operation of economic forces. What is complained of, and properly so, is the examination, without legal warrant, into private affairs and publication of the results, the consequences of which can not be foreseen.

The Sherman Law is not, as argued in the Brief for Appellants, concerned with prices but with agreements or conspiracies which may result in fixing or enhancing prices. The offense condemned in *American Column & Lumber Co. v. United States*, 257 U. S., 377, was the action *in concert* of lumber manufacturers to affect interstate commerce and restrict competition therein. The Court applied the law to manufacturers because of the purpose to restrict competition, not because of the curtailment of production or because the law applied to production. That case is hardly an authority in support of the desire of the Commission for publicity as to facts and figures on production.

The argument for requiring balance sheets and income statements is, like that as to information on intrastate business, reducible to absurdity: the Commission is entitled to them because unless it has them it cannot determine whether they contain information to which it is entitled.

THE COMMISSION, THEREFORE, HAS NO AUTHORITY TO REQUIRE THE INFORMATION DEMANDED.

E. Enforcement of the demands of the Commission would violate rights secured to the appellees by the Fourth Amendment to the Constitution.

The enforcement of the orders of the Commission amount to an unreasonable search and seizure in violation of the Fourth Amendment to the Constitution. The Commission is asking for information on matters of interest solely to the appellees and involving facts as to their individual businesses which not only are of no concern to the Commission and not within its jurisdiction but which each appellee considers trade secrets.

It is true that the Commission has obtained no search warrant and has not physically invaded the premises of the appellees or examined their books. Its demands have, however, been reinforced by pointed references to the penalties impending if the appellees shall refuse compliance with those demands. Physical entry upon the premises and manual seizure of person or property are not requisite to a violation of the Fourth Amendment. In *Boyd v. U. S.*, 116 U. S., 616, the Court had to consider the validity of a statute of Congress which provided that in certain cases upon motion of counsel for the Government a court could order the production of documents and upon non-compliance therewith the allegations in the motion should be taken as true. The subject matter of the case was clearly within the jurisdiction of Congress since it involved frauds on the customs yet the Court held that the Government could not by such a statute achieve the same results as by a search and seizure when a search and seizure could not lawfully be had.

In the present case the Commission by the infliction or at least the threatened imposition of penalties endeavors to compel the production of evidence on matters which do not concern the Commission. If Congress violates the

Fourth Amendment by statutory enactment having the effect of compelling the production of evidence in a suit properly brought to punish an alleged offense against the customs laws of the nation, unquestionably a body subordinate to and deriving its limited authority solely from Congress cannot compel the disclosure of facts on subjects over which such body has no jurisdiction and in respect of which no action, criminal or civil, is being prosecuted. It is not doubted that Congress had power to confer, and did confer, upon the Commission some authority to make investigations and in connection therewith to compel the production of evidence. We are not here concerned primarily with what regulatory power the Commission may have, but solely with the right of the appellees to be protected in the privacy of such of their affairs as are not within the jurisdiction of Congress. The position of the appellees on this point is that the Fourth Amendment guarantees to them the right of privacy as against Congress or any creature of Congress except in so far as that right must be subject to the superior right of the Government to secure information as to matters within the purview of Congressional power.

If by the Constitution Congress had been given unlimited power over corporations or over business in general, it may be that a corporation could not interpose the Fourth Amendment in any investigation which Congress might authorize into corporations or general business. The instrument of which the Fourth Amendment is a part is the only source of Congressional authority and from that source flows no general authority over corporations and a power over business only in so far as it can be brought within the definition of commerce among the States or with foreign nations, hence the Fourth Amendment is a safeguard against any indiscriminate invasion under pre-

tense of Congressional authority of the rights of privacy of corporations as well as of individuals. The Commission justifies this investigation on the theory that Congress gave to it the power, bounded only by the discretion of the Commission, to examine the affairs of any corporation which may in any degree engage in interstate commerce. The appellees reply that if such power was intended to be given the Fourth Amendment renders the grant thereof unconstitutional.

That Congress itself is under restraint in the direct investigation of matters on which it desires information was settled by the case of *Kilbourn v. Thompson*, 103 U. S. 168. That case was an action for false imprisonment brought against the Speaker, other Representatives and the Sergeant-at-Arms of the House by a witness who for refusal to testify before a Committee of the House had been adjudged in contempt and placed under arrest. The Members of Congress were held to be protected by their constitutional privilege but the Sergeant-at-Arms was held liable. The Court avoided deciding the question actually at issue, whether Congress had general power to adjudge any one in contempt, by deciding that since the Committee was investigating a matter upon which Congress, regardless of the outcome of the investigation, could not enact legislation it had no power to compel the giving of testimony in such matter. The matter being investigated was a settlement reached by the Trustee in bankruptcy of the firm of Jay Cooke & Co., of which the Government was a creditor, with a so-called "real estate pool" in which, it would appear, some members of the firm were interested. As the matter was in the courts, the courts and not Congress had jurisdiction and if the courts could afford no remedy Congress could not by any proper legislation change the situation.

We have shown above that the Act did not give to the Commission or purport to give to it the power which the

Commission claims. Our contention here is two-fold: The Act must if possible be given a construction which will not render it unconstitutional and hence, as any other construction would bring it into conflict with the Fourth Amendment, the construction which we have indicated is thus shown to be correct; if our construction is not warranted by the statute as it stands, then Congress has enacted a statute in excess of its authority and the Act is void because conflicting with that Amendment. Leaving aside all questions as to elimination of corporations, the relevance or materiality of questions as a matter of evidence or the rights of witnesses in proceedings to which they are not parties, which usually are involved in cases where this Amendment is in question, the sole question here raised is whether Congress can authorize any body to ask any questions and compel the production of any information which that body may deem it advantageous to Congress or to the public to have answered or produced. The *Kilbourn* case definitely answers the question. Congress can require or authorize to be required only such information as concerns a subject matter of which Congress has jurisdiction. It begs the question to say, as the Commission says, that Congress must have full information to enable it properly to legislate on any matter. Any tariff, census, tax, commerce or war legislation of Congress can be scientifically sound and based on full information only if Congress has been endowed with omniscience or aided by a commission with authority to gather information in encyclopaedic detail. If such justification authorizes the requirement that all desired information be produced then there is nothing in the Fourth Amendment.

The Commission, however, says that the Amendment does not apply to corporations or that the power of Congress—that it searches individuals only as standard practice but the clause of the Constitution granting power to

Congress must be construed in the light of the other clauses and the Amendments affecting the rights of citizens. Otherwise the Amendment must be construed as if it read in effect that all persons shall be protected against unlawful searches and seizures and no person shall be required to give any testimony which may tend to criminate him except that Congress may require the production of any testimony which it or anybody to which it shall delegate authority may desire.

As this Court said in *Counselman v. Hitchcock*, 142 U. S., 547, at page 585: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect."

In the case of *Hale v. Henkel*, *supra*, Justice BREWER, who with Chief Justice FULLER dissented from the opinion of the majority, used the following language (page 86):

"Neither does the fact that a corporation is engaged in interstate commerce in any manner abridge the protection and applicable immunities accorded by the amendments. The corporation of which the petitioner was an officer was chartered by a State and over it the general Government has no more control than over an individual citizen of that State. Its power to regulate commerce does not carry with it a right to dispense with the Fourth and Fifth Amendments, to unreasonably search or seize the papers of an individual or corporation engaged in such commerce, or deprive him or it of any immunity or protection secured by either amendment."

An officer of a corporation had been adjudged in contempt and had been committed for refusal to testify as to the business of the corporation or to produce all the papers demanded by a Federal Grand Jury which was investigating an alleged combination of laborers committed in violation of the Sherman Law. The case came before the Supreme Court on the appeal of the witness from an order

of the Circuit Court which dismissed a writ of habeas corpus. Although the Court sustained the order as to the dismissal of the writ, it held that the subpoena duces tecum was so sweeping in its terms as to amount to an unreasonable search and seizure and as the Court pointed out it would be difficult if not impossible for the corporation to conduct its business if all the material called for by the subpoena were delivered to the Court. The majority of the Court was of the opinion that the subpoena could be modified and that such modification would not affect the duty of the officer of the corporation to testify and would not give him any right to plead on behalf of his corporation the Fourth and Fifth Amendments. The dissent of the justices above mentioned was based upon their view that, admitting the defect in the subpoena, the order adjudging the witness in contempt should have been nullified. It would seem that the power to enforce laws on the statute books is at least of equal dignity with that of enacting new legislation and if the Government in the prosecution of any criminal case is limited by the prohibitions of the Fourth and Fifth Amendments it clearly is limited at least to the same extent by those Amendments in any investigation which may be undertaken preparatory to legislation.

The courts have indeed taken that view of the problem. In the *Harriman* case above cited, although the Court was not called upon to decide whether the investigatory power of Congress is unlimited, it did call attention to the statement in the case of *Interstate Commerce Commission v. Brinson*, *supra*, that such power as Congress has is not unlimited and the whole spirit of the opinion, from which the justices who gave a dissenting opinion did not dissent, is that the power in any Commission created by Congress to require testimony is limited, "as it usually is in English speaking countries at least, to the only cases where the sacrifice of privacy is necessary—those where

the investigations concern a specific breach of the law." It will be noted that in the *Harriman* case exactly the same contention was made by the Interstate Commerce Commission as in this case, namely, that it was authorized to procure any information which it deemed necessary for the performance of its duty to recommend additional legislation to Congress.

In the *Ellis* case, *supra*, which involved the same Commission, the objection of the witness to answering the questions propounded to him was based not upon the likelihood of incrimination by his answers but upon the fact that the inquiry was into affairs which were of no concern to that Commission. The Court expressly held that that Commission had no power to fish for information from strangers to the matters subject to regulation by it. In that case the Justice who dissented from the opinion agreed with the principle that the only power conferred upon the Interstate Commerce Commission was to make investigation into the affairs of outsiders only in so far as those affairs directly affected the subjects over which that Commission had some power.

The *Goodrich* case, on which the Commission places excessive reliance, is not in the slightest degree out of harmony with these decisions. That case is indeed a recognition of the principle followed in those opinions. Recognizing the supremacy of the Federal power over interstate commerce, the Court refused to limit the Interstate Commerce Commission to requiring information applicable strictly to interstate commerce when the matters concerning which inquiry was made involved intrastate affairs in such manner that the intrastate could not be separated from the interstate and could be used as a means of concealing information as to the interstate affairs.

That the protection of the Fourth Amendment does apply to corporations is clear from the case of *Hale v. Henkel*, *supra*. The language of Justice BREWER, con-

curred in by Chief Justice FULLER, in his dissenting opinion in that case is illuminating as to the supervisory power of Congress over corporations (page 87):

"The right of visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers. It would be strange if a corporation doing business in a dozen States was subject to the visitation of each of those States, and compelled to regulate its actions according to the judgments—perhaps the conflicting judgments—of the several legislatures. The fact that a state corporation may engage in business which is within the general regulating power of the National Government does not give to Congress any right of visitation or any power to dispense with the immunities and protection of the Fourth and Fifth Amendments. The National Government has jurisdiction over crimes committed within its special territorial limits. Can it dispense in such cases with these immunities and protections? No more can it do so in respect to the acts and conduct of individuals coming within its regulating power. It has the same control over commerce with foreign nations as over that between the States."

The Supreme Court has recently followed the principle which in the case of *Hale v. Henkel* was applied by the majority and asserted in the minority opinion of Justice BREWER, namely, that a corporation is protected by the Fourth Amendment. In the case of *Silverthorne Lumber Co. v. U. S.*, 251 U. S., 385, which was a criminal suit for violation of a Federal statute, the Government attempted to introduce evidence which had been procured from the files of the corporation in an unlawful manner. The Supreme Court held that such evidence was not admissible stating "The rights of a corporation against unlawful search and seizure are to be protected, even if the same result might have been achieved in a lawful way."

The case of *Interstate Commerce Commission v. Baird*, 194 U. S., 25, is in accord with the foregoing. The Interstate Commerce Commission in that case was making an investigation upon a complaint filed by a citizen against the anthracite coal railroads during the course of which the Circuit Court for the Southern District of New York issued an order requiring the testimony of officials of the roads and the production of certain books of the corporations, particularly contracts between corporations controlled by the railroad corporations for the purchase of coal from the operators of the coal mines at a fixed percentage of the prices at tide water. The order of the Court was appealed from on the ground that the papers and questions related to matters which that Commission had no right to investigate, being private affairs of persons not parties to the proceedings.

The Court held, on the same principle which it followed in the *Goodrich* case, that the questions should be answered and the papers produced because the contracts the production of which was required and concerning which the questions were propounded were made by agencies of the railroad corporations being investigated and referred to traffic which made up a large percentage of the business of such railroad corporations and that examination thereof was important to that Commission in order that it might determine whether the contracts were used as a cloak for rebates from the railroads or excessive rates.

How far the courts will go in maintaining those rights which are protected by the Amendment is evidenced in the recent cases of *Amos v. United States* and *Gould v. United States*, both reported in 255 U. S. In the *Amos* case a defendant was on trial on an indictment charging the removal of whiskey on which the Federal revenue tax had not been paid to a place other than a Government warehouse and of having concealed such whiskey. The evidence introduced by the Government included certain

whiskey found in the home of the defendant and taken therefrom by revenue agents who called at his home in his absence and were admitted to the premises, apparently without any protest, by the defendant's wife. The agents had no warrant for arrest or for search.

In the *Gouled* case the defendant had been indicted for conspiracy to defraud the Government in connection with Army contracts. A friend of the defendant who was a private in the Intelligence Department of the Army secured access to the papers of the defendant and abstracted certain of them bearing upon the alleged fraud. When these papers were offered in evidence the defendant objected on the ground that admission of such evidence would violate the Fourth Amendment. The Supreme Court was unanimously of the opinion that the lower court erred in not striking out the evidence. This Court said (page 303) :

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U. S., 616, in *Weeks v. United States*, 232 U. S., 383, and in *Silverthorne Lumber Co. v. United States*, 251 U. S., 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depre-

ciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."

The importance of the right of privacy as to papers was declared by Lord CAMDEN in the case of *Entick v. Carrington*, 19 Howell's State Trials, 1029, as quoted by Mr. Justice BRADLEY in the case of *Boyd v. U. S.*, *supra* (page 627) :

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

In *ex parte Jackson*, 96 U. S., 727, violation of a statute against mailing any papers dealing with lotteries was involved. The Court had no evidence before it as to how the particular package was mailed and therefore had to pass merely upon the constitutional power of Congress to forbid the use of the mails for such purpose. In the course of the opinion, which was delivered by Mr. Justice FIELD, this Court said (page 733) :

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the things to be

seized, as is required when papers are subjected to search in one's own household."

It is thus clear from the *Silverthorne* and *Hale* cases as well as from the *Ellis* case that the Fourth and Fifth Amendments protect a corporation as well as an individual. It is also clear from the *Ellis* and *Harriman* cases that the right of privacy is to be protected in all cases where threatened and not merely in criminal actions. Therefore the principles followed by the Court in the *Harriman* and *Ellis* cases, and in the *Kilbourn* case particularly, must apply to the present cause and it must be held that Congress does not have the power to authorize any Commission to require the production of any evidence which such Commission may desire except in conformity with the rights of citizens, including corporations, under the Fourth and Fifth Amendments and that any unlimited grant of power to require testimony would clearly be in derogation of these rights and thus unconstitutional. The construction placed upon the Act by the Commission thus renders it unconstitutional because not within the power of Congress under the Commerce Clause and also because it constitutes an unwarrantable invasion of the privacy of the appellees violative of the Fourth Amendment.

THE APPELLEES THEREFORE SUBMIT THAT CONGRESS DID NOT INTEND TO GIVE TO THE COMMISSION ANY AUTHORITY TO INVESTIGATE THE AFFAIRS OF A CORPORATION ENGAGED IN INTERSTATE COMMERCE EXCEPT IN RESPECT OF ITS INTERSTATE AFFAIRS; THAT CONGRESS COULD NOT GIVE TO THE COMMISSION ANY POWER TO INVESTIGATE THE AFFAIRS OF A CORPORATION ENGAGED IN INTERSTATE COMMERCE EXCEPT AS TO SUCH INTERSTATE AF-

FAIRS BECAUSE CONGRESS ITSELF HAS NO JURISDICTION OVER THE OTHER AFFAIRS OF SUCH A CORPORATION; AND FINALLY IF CONGRESS DID INTEND TO GRANT POWER TO THE COMMISSION TO INVESTIGATE ALL THE AFFAIRS OF ANY CORPORATION ENGAGED IN INTERSTATE COMMERCE SUCH ENACTMENT IS NULL AND VOID AS IN EXCESS OF THE CONSTITUTIONAL POWER OF CONGRESS AND BECAUSE IT IS IN VIOLATION OF THE FOURTH AMENDMENT OF THE CONSTITUTION SINCE SUCH AN ENACTMENT WOULD AMOUNT TO AN UNREASONABLE SEARCH AND SEIZURE.

III.

The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the appellants from the files should be affirmed.

Respectfully submitted,

PAUL D. CRAVATH,
HOYT A. MOORE,
Of Counsel.

FILED

NOV 16 1925

WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 1

FEDERAL TRADE COMMISSION *et al.*,
Appellants,
against

CLAIRE FURNACE COMPANY, RELIANCE COKE
COMPANY *et al.*,
Appellees.

**APPEAL FROM THE COURT OF APPEALS
OF THE DISTRICT OF COLUMBIA.**

**SUPPLEMENTAL BRIEF FOR THE
APPELLEES ON REARGUMENT.**

PAUL D. CRAVATH,
HOYT A. MOORE,
A. ARTHUR JENKINS,
of Counsel.



INDEX.

PAGE

STATEMENT OF THE CASE:

Preliminary statement	1
The question involved	2
The character and extent of the information sought and the purpose of the Commission in requiring it	2

CONTENTS:

I. Whatever authority the Commission had for requiring the information must be found in the Federal Trade Commission Act	3
II. Analysis of the decisions in the <i>Tobacco and Grain Companies cases</i>	4
A. The law laid down by this Court in the <i>Tobacco Companies case</i> and the <i>Grain Companies case</i> applies to the present case	12
III. Analysis of Supplemental Brief of Appellants	14
A. The only periodical reports authorized are annual reports	15
B. The order is invalid because not limited to interstate commerce	17
C. Extent of the power claimed by the Commission	18
D. The power of Congress under the commerce clause is limited to preserving freedom of commerce	19
E. Congress cannot fix or regulate prices to be charged by manufacturers	22
F. The Fifth Amendment is involved	25
G. The vagueness of the power claimed	26
H. The intermingling of intrastate and interstate transactions does not justify the demand of the Commission	28

	Page
(1) Counting of accounts does not expose them to congressional investigation	31
(2) The interstate activities of the Appellees have no bearing on interstate commerce	32
J. The examination of books to check the reports must be also properly limited	31
K. Profits or prices are not the concern of the Commission	32
L. Productive capacity and production do not concern the Commission	33
M. Proper subjects to be covered by reports and exactly so suggested	33
N. Manufacturing is not a public or common calling	40
VI. The doctrine of the <i>Harriman case</i> applies here	44
VII. On the Appellant's own argument as to the Fourth Amendment its order violates that Amendment	45
VIII. The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the Appellants from the files should be affirmed	55

TABLE OF CASES CITED

Board of Trade v. Olsen (262 U. S. 1).....	44
Hayd v. U. S. (116 U. S. 616).....	52
Eastern Whig & Loan Assoc. v. Williamson (189 U. S. 22).....	39
Ellis v. Int. Com. Comm. (237 U. S. 131).....	54
Federal Trade Comm. v. American Tobacco Company (253 U. S. 288).....	24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

CONSTITUTIONAL PROVISIONS AND STATUTES CITED.

	PAGE
Constitution of the United States:	
Fourth Amendment,	
14, 29, 38, 41, 45, 46, 47, 48, 49, 50, 51	
Fifth Amendment	25
Clayton Act (38 Stat. 730)	22, 45
Section 2	21, 39
Section 3	39
Section 7	39
Section 8	40
Section 10	40
Deficiency Appropriation Act of Nov. 4, 1919 (41 Stat. 327, 328)	6
Federal Trade Commission Act (38 Stat. 717),	
3, 5, 6, 8, 18, 27, 30, 34, 37, 38, 42, 45, 50	
Section 5	7, 39
Section 6	
Par. (a)	3, 7, 11, 12, 15
Par. (b)	3, 11, 12, 13, 15, 16, 17, 38, 41, 45
Par. (c)	7, 28
Par. (d)	7, 28
Par. (e)	7, 28
Par. (h)	7
Section 9	6, 7, 12, 15
Section 10	11, 12
Interstate Commerce Act	
Section 20, as amended (41 Stat. 474)	41
Webb Act (40 Stat. 516)	40

IN THE

Supreme Court of the United States

FEDERAL TRADE COMMISSION *et al.*,
Appellants,

against

CLAIRE FURNACE COMPANY, RELIANCE
COKE COMPANY *et al.*,
Appellees.

October Term, 1925.
No. 4.

SUPPLEMENTAL BRIEF FOR APPELLEES ON REARGUMENT.

Preliminary Statement.

This case was brought to this Court by appeal from a decree of the Court of Appeals of the District of Columbia affirming a decision of the Supreme Court of the District. The latter Court found that the amended answer of the Federal Trade Commission (hereinafter referred to as the Commission) was defective in not stating a defense to the bill brought by the Appellees and, the Appellants having refused an opportunity further to amend their answer, the Court struck out the amended answer and granted an injunction restraining the Commission from taking steps to compel the Appellees to file the monthly reports demanded by the Commission's order.

This supplemental brief for the Appellees on reargument is filed for the double purpose of answering the Supplemental Brief filed on behalf of the Commission and of discussing the application to the present case of the law as laid down by this Court in two cases decided

since the original argument, viz., the *Tobacco Companies* case,

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298,

and the *Grain Companies* case,

Federal Trade Commission v. Baltimore Grain Company et al., 267 U. S. 586.

A partial restatement of the argument of our main brief will be necessary in this connection.

The Question Involved.

This case presents squarely the question whether the Commission has power to require corporations engaged in the manufacture of steel and iron products or in the production of coke to file with the Commission monthly reports giving the costs and sales prices of products manufactured by them and a vast amount of other information regarding their manufacturing operations and purely intrastate activities, simply because a part of their manufactured products is sold, and a part of the raw materials utilized at their plants is purchased, in States other than those in which those plants are located. Two or three of the Appellees apparently do not purchase any of their raw materials or sell any of their manufactured products in interstate commerce (Record, page 79). All the others sell some portion of their manufactured products, and most of them purchase or produce some portion of their raw materials, in States other than the States where their respective manufacturing plants are located.

The Character and Extent of the Information Sought and the Purpose of the Commission in Requiring It.

The arguments in the Supplemental Brief for the Commission (pages 4, 14-15) as to the reasonableness of the

demand of the Commission might give the erroneous impression that the information called for in this case is information to which publicity already is given by the Appellees, either in reports to stockholders or in reports to State authorities or to stock exchanges on which the various Appellees may have listed their securities. Such an impression would be wholly contrary to the facts. The information called for by the Commission is not of the same character as that furnished in annual reports to stockholders or required to be filed with State authorities or with stock exchanges, but is wholly different. The kinds of information called for by the Commission are so numerous and comprehensive that if its power to secure the information which it has demanded could conceivably be sustained there would be no limit to the scope of the reports which the Commission could require. It contends that there is no limit to the frequency with which reports may be demanded. The demand is particularly shocking because it aims especially at costs and profits, the most jealously guarded secrets of every manufacturer.

The Commission served upon each of the Appellees an order (Record, page 12) reciting that the Commission, pursuant to a resolution adopted by it under the powers conferred by paragraphs (a) and (b) of Section 6 of the *Federal Trade Commission Act*, 38 Stat. 717 (hereinafter called the Act), and a special appropriation by Congress, required each of the Appellees to furnish monthly statements of information regarding its business covering a wide range and specified in the forms prepared by the Commission and accompanying the order. With the order the Commission furnished instructions for filling out the forms. It also gave instructions and directions as to the form and contents of accounts to be kept and the allocation of expenditures in calculating manufacturing costs and profits.

The information called for by the order may be summarized as follows:

- (1) statements of the quantities of 44 specified products produced at each plant;

(2) cost sheets covering 25 specified products for each battery of ovens, furnace, mill or other unit of operation;

(3) statements of sales prices, meaning "the actual realization f.o.b. mill, after deduction of freight allowance made to purchaser," in respect of 19 specified products, including separate reports thereon in respect of domestic and export shipments;

(4) statements of the contract prices, meaning "the base price less freight allowance to be paid by purchasers and to be deducted from invoices", specified in orders booked or formal agreements for future delivery entered into during the month in respect of the same 19 products;

(5) statements of the capacity of the ovens, furnaces, works and mills in respect of 18 specified products;

(6) statements of orders booked during each month and quantity of unfilled orders outstanding at the end of each month for the same 19 products the sales and contract prices of which were to be reported; and

(7) statements of the depreciation and general administrative and selling expenses allocated to 17 specified products, details of income from other sources, balance of net income transferred to surplus, with details of interest, rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies, income from outside investments, and details of deductions from net income, federal income and excess profits taxes, interest on bonds and notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officials, etc. (Record, pages 15 to 34.)

If the Commission can lawfully require from manufacturing corporations information of the broad character of that above summarized, there is no limit to the information which it can require.

So as to the frequency of the reports. If the Commission may call for monthly reports, it may call for weekly reports or daily reports.

So as to the purposes for which the information is sought. Among the possible purposes that are disclosed by the Commission's answer and by the Brief of its counsel are the following:

the ascertainment and disclosure of the causes of high prices of commodities, including necessities of life (Appellants' Main Brief, pages 52-53);

publication for the information of the public and others in the industry (Record, page 78);

the stimulation of competition which the Commission believes would automatically result from the publication of costs and prices (Appellants' Main Brief, page 70);

the regulation of the interstate commerce of the Appellees by such publication and the avoidance of more drastic forms of regulation (Record, page 87);

making reports and recommending legislation to Congress (Record, page 87); and

preventing undue fluctuations and panic markets (Record, page 87).

If the Commission can lawfully obtain information for these purposes, it can obtain information for any conceivable purpose.

So also as to the degree of publicity which may be given to the information obtained by the Commission. It is true that in the present case the Commission disavows any intention of publishing any information given by a particular manufacturer. It may, however, change its mind. Whatever be its intention in the present case, in another case it might make public all the information. It undoubtedly has the power to make public in any way it chooses all the information it obtains, subject only to the limitation imposed by the Act that it shall not make public "trade secrets and names of customers".

May change their minds =

So as to its power to summon witnesses. There can be no doubt that the Commission has power to require the testimony of witnesses and the production of records in relation to any subject in respect of which it may require reports, and, under Section 9 of the Act, in any case in which the Commission is authorized to obtain information it can require the attendance of witnesses from any part of the United States.

Therefore, if the power now claimed by the Commission is sustained, the Commission will be in a position to require manufacturing corporations a portion of whose products enter into interstate commerce to file at such frequent intervals as the Commission may desire sworn reports giving unlimited information regarding their affairs for any purpose the Commission may have in view, give to the reports such publicity as the Commission in its unrestrained discretion may deem wise and summon witnesses from any part of the United States for examination regarding the contents of the reports.

Argument.

Whatever Authority the Commission Had for Requiring the Information Must Be Found in the Act.

As the Appellants in their Supplemental Brief (page 23) admit, the authority for requiring this information cannot be found in the Deficiency Appropriation Act of November 4, 1919 (41 Stat. 327, 328), referred to in the order of the Commission. That Appropriation Act did not enlarge the scope of the powers of the Commission as found in the Act creating it. Except for the Act, there is no source from which such authority could be claimed.

The Tobacco and Grain Companies Cases.

It will be convenient to start the present discussion with an analysis of the decisions of this Court in the *Tobacco Companies* case and the *Grain Companies* case,

supra, with a view to determining the extent to which the law as therein decided is applicable to the present case and the respects in which the facts in those cases differ from the facts in the present case.

In both the *Tobacco Companies* case and the *Grain Companies* case the order of the Commission in question required not *reports*, as in the present case, but the production of books and papers for inspection by the Commission or its agents. In both the *Tobacco Companies* case and the *Grain Companies* case the only possible source of the authority of the Commission was paragraph (a) of Section 6 of the Act, which is as follows:

"Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce and its relation to other corporations and to individuals, associations, and partnerships."

In neither case was there a proceeding under Section 5 of the Act by which "unfair methods of competition in commerce are * * * declared unlawful", or an investigation under paragraph (d) of Section 6, which authorized the Commission "upon the direction of the President or either House of Congress, to investigate and report the facts relating to any alleged violations of the antitrust acts by any corporation". In paragraphs (c), (e) and (h) of Section 6 investigatory power also is given the Commission, but for exercise only in the special and limited instances therein discussed, none of which could apply in either of the two cases under discussion.

The Commission, therefore, was acting solely under the authority that is set forth in the language which we have quoted from paragraph (a) of Section 6. In the attempt to exercise its power under that paragraph, it invoked the authority of Section 9, which provides "that for the pur-

poses of this Act the Commission or its duly authorized agent or agents shall at all times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against."

The Commission was, therefore, seeking to exercise what would seem to be the broadest investigatory power that is set forth in the Act, namely, the power to "investigate * * * the organization, business, conduct, practices and management of any corporation engaged in commerce * * * and its relation to other corporations and to individuals, associations and partnerships." In so far as the mere terms of the Act are concerned, it would be difficult to imagine a broader or more unrestricted grant of power of investigation. It is practically unlimited as to subject matter and entirely unrestricted as to basis or purpose.

In each case the Commission purported to act pursuant to a resolution of the Senate directing the Commission to obtain information regarding certain phases of the tobacco trade in the one case and the grain trade in the other, but in each case, as in the present case, the Commission was granted no investigatory powers in addition to those conferred by the Act creating it. In each case the Court held that the Commission had exceeded the powers conferred by the Act. The *Grain Companies* case was decided upon the Court's opinion in the *Tobacco Companies* case.

In its opinion in the *Tobacco Companies* case, written by Mr. Justice HOLMES, the Court said (page 305):

" * * * The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 43. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.

We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, and as to correspondence, even in the case of a common carrier, in *United States v. Louisville & Nashville R. R. Co.*, 236 U. S. 318, 335. The question is a different one where the State granting the charter gives its Commission power to inspect.

"The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. *Wigram, Discovery*, 2d ed., §293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. *Essgee Co. v. United States*, 262 U. S. 151, 156, 157. A general subpoena in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. *Hale v. Henkel*, 201 U. S. 43, 77. In the state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541. The form of the subpoena was not the question in *Wheeler v. United States*, 226 U. S. 478, 488.

"The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for

present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford v. Wallace*, 258 U. S. 495, 520, 521, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand. See *Terminal Taricab Co. v. District of Columbia*, 241 U. S. 252, 256. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

"We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but, even if they were induced by substantial evidence under oath, the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 408; *United States v. Jin Fuy Moy*, 241 U. S. 394, 401." (Italics ours.)

In spite of these decisions in the *Tobacco Companies* case and the *Grain Companies* case (regarding which the Supplemental Brief filed on behalf of the Appellants is strangely silent) the Commission seeks to sustain the orders involved in the present case, presumably because they call for reports by the corporations affected rather than the production and inspection of documents.

It will be found, however, on analysis, that the order of the Commission in the present case is just as inquisitorial and indiscriminate as were its orders in the *Tobacco Companies* case and the *Grain Companies* case. More-

over the Commission had announced its purpose to examine the books of the Appellees in order to check the reports. In its answer (Record, page 80) the Commission alleged the necessity of so doing to determine whether or not the penalty provided in Section 10 of the Act should be enforced.

In the *Tobacco Companies* case and the *Grain Companies* case the orders involved the authority granted by paragraph (a) of Section 6 of the Act. In the present case the Commission bases the authority for its order upon paragraph (a) and also upon paragraph (b), which latter reads as follows:

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

It will be observed that the subject matter of investigations under paragraph (b) is the same, and is described in exactly the same words, as the subject matter under paragraph (a), and that the terms of the authority are just as broad and unrestricted in one as in the other as to either basis or purpose of any investigation.

As a matter of fact, the authority for the order requiring monthly reports in the present case cannot be found in paragraph (a), for there is nothing in that paragraph

or in Section 9, which provides the machinery for enforcing paragraph (a), that in any respect authorizes the Commission to require *reports* from corporations under investigation. Section 9 provides

“That for the purposes of this Act the commission, or its duly authorized agent or agents, shall * * * have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *”

Therefore, if the Commission sought to “investigate” a corporation under the authority of paragraph (a), it could, under Section 9, demand the production of “documentary evidence” and the attendance of witnesses. Clearly it could not under such authority or Section require the corporation to prepare and submit reports or written answers to questionnaires.

Therefore it is in paragraph (b), if anywhere, that the authority of the Commission for requiring in the present case monthly reports from the Appellees must be found.

Examination of the entire Act shows that the power that it purports to grant to the Commission in the examination of corporations under paragraph (b) is even more drastic than the grant expressed in paragraph (a), for in case of an order issued under paragraph (b) not only could the Commission proceed under Section 9 to require compliance by mandamus, but a penalty is also provided for under the following provision of Section 10 of the Act:

“If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the

Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

It will be observed that this penalty is applicable only to a failure to file an "annual or special report" required by the Commission pursuant to paragraph (b).

The Law Laid Down by This Court in the Tobacco Companies Case and the Grain Companies Case Applies to the Present Case.

It would therefore seem to follow that the considerations which prompted the Court in its decision in the *Tobacco Companies* case and the *Grain Companies* case to limit the inquisitorial powers of the Commission apply with equal, if not greater, force to the present case.

Every objection offered to the inquisition in the *Tobacco Companies* and *Grain Companies* cases applies to the present case. There is the same risk of "the interruption of business or possible revelation of trade secrets and the expense that compliance with the Commission's wholesale demand would cause". There is the same effort, "in the hope that something will turn up", to conduct a "search", in this case by requiring *reports* of indefinite and indiscriminate scope rather than by the examination of "all the respondent's records, relevant or irrelevant", although in this case such an examination following the filing of the reports was threatened. In the present case, as in those cases, "the demand was not only general, but extended to information concerning business done wholly within the state." In the present case, as in those cases,

the possibility that "some part of a presumably large mass of" information "relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant * * * does not warrant a demand for the whole". To the present case may be applied with equal force the emphatic declaration of the Court in its opinion in the *Tobacco Companies* case that

"Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission v. Brimson*, 134 U. S. 417, 479) and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime."

and the final observation that "we cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."

Analysis of Supplemental Brief of Appellants.

Most of the argument in the Supplemental Brief of the Appellants is in effect an argument against the views of this Court in its opinion in the *Tobacco Companies* case, although as already remarked no mention is made of the decision in that case or in the *Grain Companies* case. That argument endeavors at length to prove the reasonableness of the demand of the Commission. But the Court in the *Tobacco Companies* case did not rely on the extensiveness of the demand, nor did it base its decision on the ground that being unlimited the demand would involve an unreasonable search. It said (p. 306):

"The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations."

The decision stands squarely upon the ground that it is inconceivable that Congress should have intended to grant to the Commission the right, in its own discretion, to examine any papers of a corporation simply because it engages in interstate commerce.

We, therefore, may fairly begin our discussion of the argument offered on behalf of the Commission by applying to the present case the observation from the opinion of the Court in the *Tobacco Companies* case that "nothing short of the most explicit language would induce us to attribute to Congress" the intent to confer upon the Commission the indiscriminate inquisitorial powers now sought to be exercised.

Applying that test, it is impossible to sustain the powers claimed by the Commission.

The Only Periodical Reports Authorized Are Annual Reports.

In the first place, the Act does not in any case authorize the Commission to require *monthly* reports. As already pointed out, the authority conferred by paragraph (a) to "investigate * * * the organization, business, conduct, practices and management of any corporation engaged in commerce" does not extend to the requirement of *reports*. Inquisitorial power under that paragraph apparently can only be exercised through the machinery of Section 9 providing for access to "documentary evidence" and the "attendance and testimony of witnesses."

As stated above, the authority, if any exists, for the order in question requiring monthly reports must, therefore, be found in paragraph (b). That paragraph, however, only authorizes the Commission to require of corporations engaged in interstate commerce "*annual or special, or both annual and special, reports or answers in writing to specific questions*". In the Report from the Committee on Interstate and Foreign Commerce which is attached as Appendix A to the Main Brief of the Appellants is found the following explanation, by the member of the Commit-

tee who submitted the Report, of the purpose and nature of the provisions subsequently embodied in the present paragraph (b) :

"12. There has been serious question, however, whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations. None were contemplated in the law creating that bureau, and there was no compulsory power provided to obtain them.

"13. Therefore, in section 9 of the bill, annual reports from the great industrial concerns of the country are provided for, setting forth essential facts connected with the organization, stockholders, financial conditions, and general business conduct of those concerns."

The bill so submitted provided for the filing of regular annual reports by all corporations affected having a capital of more than \$5,000,000. The bill also provided that the Commission should have power to classify corporations having a smaller capitalization and to require similar regular annual reports from classes of such corporations. The report then proceeds to explain the nature and purpose of the *special* reports to be required, as follows:

"15. The Commission, under this section may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary."

It is therefore clear that, in so far as the requirement of *periodical* reports is authorized, only *annual* reports were contemplated. In proposing to authorize special reports the Committee, at least, did not have in mind periodical reports, but only special reports prompted by some special purpose or emergency, such as the case where the

information furnished by annual reports proved inadequate.

It seems hardly necessary to give serious consideration to the contention that a special report might be required each month indefinitely by the service of a special order each month and that therefore the requirement in one order of a recurring monthly report was a simple means to the same end. Clearly a special report from its very name must be prompted by a special purpose. A monthly recurring special report is a contradiction of terms.

Manifestly there is a vast difference between authority to require annual reports, or a special report for some particular purpose, and authority to require recurring reports at any regular intervals, however frequent, that the Commission might fix. If the Commission can require monthly reports it can require weekly reports or daily reports. Certainly an intention of Congress to authorize the Commission to require reports of unrestricted frequency would require clear and unequivocal language, while the language of paragraph (b) clearly indicates that the only periodical reports authorized are annual reports.

The Order Is Invalid Because Not Limited to Interstate Commerce.

Not only must the order in the present case be held to be beyond the power of the Commission because it requires neither annual reports nor special reports, but also because the information for which it calls is not limited to interstate commerce. It extends to activities which are purely intrastate; in fact, it is only information as to such activities that is primarily desired by the Commission. Clearly the major part of the information sought relates to production and manufacture and intrastate transactions and has only the most remote and indirect bearing upon interstate commerce, if it has any. This is especially true of the information sought regarding "quantities produced, costs and methods of computing costs, expenses of general

administration, capacity of plants, depreciation and accounting methods and detailed statements of income". It is difficult to see how information on these subjects can have any relation to interstate commerce sufficiently close and direct to justify the Commission in requiring the production thereof to aid the Commission in any legitimate function which it may exercise in connection with interstate commerce. It is too obvious for argument that the functions of the Commission and the Act itself deal solely with interstate commerce.

The only information sought which on any theory may possibly have any direct bearing on interstate commerce is that regarding prices and the volume of orders booked and filled. Such information, if required, should be confined to interstate transactions. Excepting only export sales and contracts, the report forms do not call for even one item of information concerning that commerce which is within the power of Congress to regulate; nor do they indicate any interest on the part of the Commission as to such commerce or any endeavor to distinguish between it and intrastate matters.

It is unnecessary, however, for us to indicate, or for the Court to decide, what reports Congress can properly require or has properly authorized the Commission to secure from the Appellees. The question is a much narrower one than that, namely:

Because manufacturing corporations *to some extent* buy and sell goods in interstate commerce has the Commission power to require them to file monthly statements of their *financial and manufacturing* operations and reports of their business of *the kind here demanded?*

Extent of the Power Claimed by the Commission.

Contrary to the contention of the Commission, there is nothing unusual in the organization or corporate character of the Appellees that confers upon the Commission any peculiar authority in regard to them. The only relation

which the Commission conceivably can have towards them is in respect of their dealings in interstate commerce. The same relation would obtain in respect of other corporations which, as do the Appellees, sell some of their products or buy some of the raw materials used by them in a State other than the State of manufacture or production.

Furthermore, as pointed out in our main brief, the power claimed to be vested in Congress, which the Commission seeks to exercise, has nothing to do with the form of organization under which the business is conducted or with the nature of the business. Therefore, if Congress has the power for which the Commission contends, it must be admitted that not only has Congress the same power over any other corporation engaged in any productive industry but also that Congress has, and could delegate, like power over any firm or individual engaged therein. Thus the same power could be exercised by Congress in respect of the costs and profits of every farmer or individual manufacturer or trader or any corporation engaged in farming or any branch of manufacture or trade. We do not know of any case or of any suggestion in any case which furnishes any basis for a claim of such enormous power in Congress over the private affairs of individuals or corporations involving their manufacturing and other intrastate activities.

The Power of Congress Under the Commerce Clause Is Limited to Preserving Freedom of Commerce.

In our main brief (Pages 58-78) we have pointed out the nature of the regulatory power of Congress and have endeavored to indicate its limits. We have also analyzed the nature of the power which Congress attempted to confer upon the Commission and we believe that we have shown that the power which the Commission is seeking to exercise not only has not been conferred upon the Commission but could not be conferred upon it by Congress. The reason, as we have shown, is that Congress cannot regu-

late corporations engaged in manufacture either because they are corporations or because they incidentally transact interstate business, nor can it regulate those subjects, even though connected with the interstate transactions of the Appellees, into which the Commission particularly seeks to inquire, that is, the costs, selling prices and profits of the Appellees.

In the

First Employers Liability Cases, 207 U. S. 463, 502, the Court said of the contention that Congress can regulate all the affairs of a corporation which engages to any degree in interstate commerce (the corporations in that case being common carriers) :

"To state the proposition is to refute it. *It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject however inherently local, would obliterate all the limitations of power imposed by the Constitution and would destroy the authority of the states as to all conceivable matters which from the beginning have been and must continue to be under their control so long as the Constitution endures.*" (Italics ours.)

Chief Justice MARSHALL, in

Gibbons v. Ogden, 9 Wheat. 1, 196,

defined the power to regulate interstate commerce as the power "to prescribe the rule by which commerce is to be

governed." As to the power to regulate prices this Court, speaking by the present Chief Justice, has recently declared, in

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 537 :

"It has never been supposed, since the adoption of the constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. * * *".

In Section 2 of the Clayton Act Congress has, it is true, legislated regarding certain relations between various prices, but such legislation is not aimed at prices as such and does not seek the naming or raising or lowering of prices. It is not concerned with the mere figure at which certain prices may stand. It deals merely with a practice, of those who may have interstate transactions, which may impair that freedom of interstate commerce that the commerce clause was intended to enable Congress to preserve.

The chief difficulty with the position of the Appellants is that they apparently do not take into account the nature of commerce. It appears to be their belief that any transaction engaged in between citizens of different States or which may involve the crossing of State lines is interstate commerce and that Congress can enact any conceivable legislation not only in respect of such transaction but also in respect of the business of those interested in such transaction or, if those so interested be corporations, then in respect of the corporations themselves. We believe that interstate commerce has a larger significance, that it includes not only the crossing of State lines but also, and more particularly, the effect on the welfare of the States as a union. The history of the Constitution itself reveals that the commerce clause was adopted with a view to preventing one State from interfering with the freedom of the con-

duct of business by its citizens in other States and by citizens of other States in such State, that is, the fundamental idea was, as indicated in the *First Employers Liability Cases*, *supra*, to maintain the fullest possible freedom of trade within the boundaries of the union.

Congress Can Not Fix or Regulate Prices to Be Charged by Manufacturers.

Even if it were to be assumed that the Commission, in order to determine whether or not a manufacturer in his practice respecting prices is discriminating against certain customers or sections, may investigate the *actual prices charged* in interstate commerce by such manufacturer, it would not follow that the Commission merely to inform itself as to the *average prices charged* for specific articles can investigate the profits of the manufacturer and his manufacturing costs. The average prices of the Appellees, or of any of them, would not reveal any violation by the Appellees, or by any of them, of the Clayton Act or of any other Act of Congress, and we are unable to conceive of any action which Congress might take in respect of average prices or profits.

The conduct of those engaged in interstate commerce that Congress may authorize a commission to investigate is that conduct which there is reason to believe may have violated some rule prescribed by Congress, and possibly also in particular cases such conduct as Congress may particularly desire to have investigated because deemed so to affect others engaged in interstate commerce as to require exercise of the regulatory power of Congress to a definite end. Although the conduct of one or more traders in interstate commerce resulting in the artificial control of such advance or fall of prices and the consequent lack of freedom of interstate commerce may be regulated and, hence, investigated in proper circumstances and in a proper manner, the advance or fall of prices as such is not subject to regulation by Congress. Hence, the fact that Congress

desires to be informed thereon is no warrant for it to invade the privacy of buyers and sellers who agree on such prices.

The only power which Congress has in respect of the obtaining of information is to obtain by proper methods that information which may be useful in the exercise of such powers as have been granted to Congress. Its power to obtain any information is in any case only an implied power as there is in the Constitution no delegation to Congress of general investigatory power, except under the census clause. Therefore, the implied power must be traced to the necessity of its use in connection with the exercise of some specifically granted power and when in respect of interstate commerce information is sought by Congress, its right to secure the information must be tested by the relevance of the information desired to the possible regulation by Congress of interstate commerce.

Such information, therefore, must be useful to Congress in connection with some rule which Congress can prescribe for the regulation of interstate commerce. This clearly does not apply to information sought solely for the purpose of learning the cost of manufacturing a particular article or the price at which that article was sold, since Congress has not been given any power to fix a rule governing the price at which any article shall be sold in interstate commerce. It is proper for Congress to prescribe a rule, and Congress has prescribed some rules, governing the action of several acting in combination in *fixing* prices where such action in combination would be an impairment of the freedom of commerce. Congress has also prescribed a rule that one may not so name prices for the same articles in different territories as to affect the freedom of others in interstate commerce by discriminating in favor of territories where competition is keen and to the disadvantage of territories where there is no competition. In such legislation Congress has not claimed any power to say how high or how low the price shall be for any article or what profit shall be made in the sale thereof, but has sought only to maintain the freedom of others engaged in interstate commerce from restraint by a particular seller who may be in

position to usurp the power of Congress to regulate interstate commerce.

Facts as to the actual prices charged by a corporation for goods sold by it in interstate commerce and the amount of its profits thereon cannot, in the absence of further evidence as to many other conditions, be shown to have any relevancy to any rule which Congress has prescribed or may prescribe for the regulation of interstate commerce and, therefore, there is no implication in the Constitution of a power in Congress to compel any corporation to divulge the cost of making any of its product, the price at which any of them is sold or the profit made on the sale. It is even more obvious, that what is here required, namely, the *average price* on all sales of various articles in an entire industry, cannot have such relevancy.

The demand of the Commission does not concern any elements or phases of the affairs of the Appellees that Congress can regulate, or involve in any respect the manner in which the Appellees conduct their interstate transactions. The demand is limited to manufacture and the incidents thereof, particularly to the costs of manufacture (although manufacture is not commerce and is not subject to congressional regulation), the profits from manufacture and from the sale of the products thereof (whether such sale be in interstate commerce or not), the average of the prices at which such sales have been made (for the mere sake of knowing such average and without any relation to any conceivable rule which Congress might prescribe for the regulation of interstate commerce) and the methods of accounting by which the manufacturer calculates his cost (although Congress cannot regulate costs or accounting systems merely because a manufacturer, trader or farmer sells his output partly in interstate commerce). None of the information demanded is information as to any element or phase of the affairs of the Appellees which Congress can regulate or bears in any manner on any of their conduct which may be in, or may affect, interstate commerce.

The Fifth Amendment Is Involved.

It is also argued by the Appellants that the provisions of the Fifth Amendment relating to the taking of property without due process of law do not apply, since the Appellees have stipulated that the outlay in furnishing the information demanded would not be extraordinary or unreasonable. There is no warrant, however, for the statement that property would not be taken without due process of law if the Commission should compel the filing of the reports demanded.

In any industry in which keen competition exists, particularly in an industry such as the steel industry, where great capital is required to be invested in permanent plant and a skilled organization must be maintained and hence operations must if possible be continued even though costs exceed selling prices, costs are closely guarded trade secrets. In any period when demand is light, if there are two producers competing for the business each is willing to go as far as possible below his competitor's price but his aim naturally will be not to go below his own cost unless necessary. If one knows his competitor's costs he knows how far his competitor can go without loss in order to secure the business and it is, therefore, of great importance to each that his own costs be not known to his competitor.

To require the divulging of costs on each product of their mills does involve the taking of a trade secret, namely, costs, which each of the Appellees strives to guard as jealously as possible. Trade secrets, of course, are not sacred and presumably may like any other property be taken by the Government for public use but, like other property, they can be taken only by due process of law and for a reasonably necessary public use. There is no due process in the taking of trade secrets by an administrative commission which cannot administer any law in respect of such secrets or use such secrets in establishing any violation of law. No violation of law is under investigation or charged in this case. The trade secrets are to be

taken for the avowed purpose of publication, which is put forth as the principal object and the justification of the taking.

The Commission cannot assure the safeguarding of the secret information demanded.

The Appellants suggest that this case presents the question whether Congress must obtain information through special committees or commissions appointed to act on pending matters or may adopt the more scientific method of creating permanent commissions with authority to require periodical reports and obtain information by experts who are likely to ask for necessary and useful information without partisan spirit and are less likely to bring out matters which ought to be kept private than would be a temporary committee attempting the same work. The Appellees are objecting not to the permanency of the Commission but to having their private affairs investigated, whether by experts or novices, for the purpose of publication. It may be that the Commission will always consist of or employ only experts and that experts would be less likely to bring out matters which ought to be kept private than would be a temporary committee, but the appalling disregard for privacy shown by the Commission in its demands and in its pleadings and arguments does not stimulate confidence on the part of the Appellees in the judgment of the Commission or its experts as to what should be kept private. Moreover, as we pointed out in our Main Brief, the Commission cannot furnish any assurance to the Appellees that, once the Commission has secured the information, Congress will not make public all of it, nor does or can the Commission offer to any Appellee any redress if inadvertently or otherwise any of the information should be wrongfully divulged.

The Vagueness of the Power Claimed.

It appears to be the view of the Commission that the information the power to secure which can be delegated by Congress includes any information that in any manner

may involve any subject over which Congress can legislate. In support of this position the Commission asserts that the power is not dependent on the attention of Congress being specifically directed to particular legislation. From the language used by the Court in various cases the true principle would appear to be that power to require the divulging of information may be delegated in so far as the information to be required may be material to the question whether some enactment of Congress has been disobeyed. But, however this may be, what we have endeavored to show is that in the present case, whether this principle be sound or the view of the Commission be correct, if the information sought cannot, in the circumstances in which it is sought, have any pertinency to some rule which Congress has power to prescribe for the regulation of interstate commerce, Congress obviously cannot compel the furnishing thereof.

It is a corollary of the position of counsel for the Commission that whenever the Commission seeks to compel a corporation to furnish information and the right of the Commission to require the information is contested in court, it then becomes the duty of the Court to take a survey, not of the Act, or merely of all the legislation which Congress has ever passed under the commerce clause, but of all possible legislation which Congress conceivably might pass under that clause, because according to the theory of counsel if by any rational possibility the information relates to any legislation which Congress could pass under that clause, then there is a right in the Commission to require, and a duty upon the part of the corporation to furnish, the information and a duty upon the Court to compel the furnishing thereof.

When the Courts of the United States deal with the grave question of the constitutional power of Congress, they do so only with respect to a specific legislative act and consider whether that concrete enactment is within the power of Congress. The contention that the Courts should assume the additional function of determining what Congress might do but has not done, and that to this end

the Court in each case must cover the whole range of Congressional power under the commerce clause, was made and was emphatically denied by this Court in the case of *Harriman v. I. C. C.*, 211 U. S. 407, 417.

It is noticeable that in the other paragraphs of Section (6) that purport to give investigatory power over domestic corporations, namely, paragraphs (c), (d) and (e), the power is limited to cases of violation or alleged violation of the anti-trust laws. This is true even in paragraph (d) under which investigation may be directed by the President or either House of Congress.

When one engages as a public agent in the service of the public in respect of interstate commerce, the power of Congress under the commerce clause may be exercised to control his conduct in interstate commerce. Whether or not one engages in a public calling for the service of others in interstate commerce, if his conduct is such as unreasonably to restrict the freedom of others in their dealings in interstate commerce his conduct can be regulated. When the conduct of the parties to any transaction or the transaction itself is such that it affects others directly, as where it impairs the freedom of others to engage in other transactions crossing State lines, then Congress can intervene by legislation. These principles do not apply here.

The Intermingling of Intrastate and Interstate Transactions Does Not Justify the Demand of the Commission.

Great stress is laid in the Appellant's Main Brief and in their Supplemental Brief on the contention that the business of the various Appellees cannot be distinguished or segregated as between interstate and intrastate business, although at the same time equal stress is laid upon the respective percentages of the two kinds of business transacted by various Appellees. We assume that the contention is not that the accounts of the Appellees are so kept that it cannot be determined what purchases and what sales are made in States other than those where the plants

and mines of the Appellees are located, but rather that the Appellees do not in the calculation of costs or in the apportionment of the gross receipts among the various credit and debit items normally distinguish between those products which are sold in the State where manufactured or are used in the State where purchased from those which, in connection with the purchase or sale, cross State lines. Presumably it costs as much for a corporation in Ohio to make a ton of steel which may be sold in Virginia or California as a ton which may be sold in Ohio. If for the sake of argument it were admitted that the cost of producing the steel manufactured in Ohio and sold in Virginia or California may be investigated by the Commission it would not follow that the Commission can investigate the cost of producing the steel which is sold in Ohio or that the requirement as to all the costs is not unreasonable and violative of the Fourth Amendment because unlimited in amount.

The contention of the Appellants is offered less as a justification for their entire demand than in exculpation of their demand for information respecting business which admittedly is not interstate. It is based on the paragraph numbered 18 in the amended answer (Record, page 86). That paragraph contains an allegation "that unless it can procure the information called for and required, the Commission will be unable to properly perform its duties under its act." This is a conclusion of law and is not made an allegation of fact by the irrelevant and argumentative reasons stated in the paragraph in support of the conclusion. What are the duties of the Commission is a question of law to be determined by the Court and not admitted by the motion to strike out the answer. In

Finney v. Guy, 189 U. S. 355, 343,

after quoting the following from

Eastern Building & L. Assn. v. Williamson, 189 U. S. 122,

"No witness can conclude a court by his opinion of the construction and meaning of statutes and de-

cisions already in evidence. *Laing v. Rigney*, 160 U. S. 531. The duty of the court to construe and decide remains the same.”,

the Court said :

“This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign State and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to instead of being proved on a trial.”

The rule would seem to be stronger when the law is that of the Court's own jurisdiction and not of a foreign State. On the motion to strike out the answer it was the function of the Court to determine whether from the facts properly alleged in the answer, it followed as a necessary legal conclusion that the Commission had a right to secure the information. On this particular pleading the Court had the obligation of interpreting the Act and determining the duties of the Commission. When those should be determined the question would still remain, what right had the Commission to the information demanded? The particular allegation on analysis comes down to a statement by implication that the Commission has a right to secure the information because required for the performance of its duties. That is the primary allegation in the paragraph and, being merely a statement of one of the points or legal conclusions to be decided in the case, of course it was not admitted by the motion. Hence the explanation offered, not as a basis or reason for the conclusion, but as an explanation of the demand for information as to intrastate as well as interstate affairs, was also not admitted.

Certainly the statement that the separation and subtraction of intrastate activities would render the result of little or no value in enabling the Commission to perform its duties either is purely argumentative and a conclusion of law or it is wholly irrelevant and immaterial. Either it is a statement that the information as to interstate matters alone would be useless, which statement does not deny any allegation of the bill or offer any affirmative defense, or it

includes by implication the conclusion of law that the Commission has the right to secure all information of value for the performance of what it conceives to be its duties. Whichever meaning be given to the statement, the motion did not admit it to be true.

The explanatory statements attached to such conclusions or immaterial allegations, whichever they be deemed to be, are not made as allegations but as explanations of why the Commission cannot perform its duties unless it secures the information. The Commission therefore has not properly alleged, as stated in the Supplemental Brief for the Appellants (p. 4), that the intrastate activities of the Appellees are so interwoven with their interstate business that it is impossible to separate them. Even if that were alleged, it is true, as is tacitly admitted in such Brief, that there is no allegation that the *accounts* of the two classes are intermingled. All that dared be said in such Brief is that "*it is a fair inference that the accounts reflecting the operations * * * in interstate and intrastate commerce, and in business which is not commerce at all, are more or less commingled.*"

Commingling of Accounts Does Not Expose Them to Congressional Investigation.

The commingling of accounts does not give Congress any power to examine all the commingled accounts and the case of *I. C. C. v. Goodrich Transit Company*, 224 U. S. 191, does not so hold. That case certainly does not sustain the proposition that if reports may be required as to interstate business they may be required to cover also the intrastate business done by the same corporation. What that case does hold is that Congress has a right to certain information concerning interstate affairs of a common carrier, not because of the commingling of accounts, but because from the nature of the business the rates charged by the corporation for services rendered by it and the treatment of costs in its accounts were matters which were within the Con-

gressional power either as directly appertaining to interstate commerce or indirectly because involving possible evasions of Congressional regulations or because of their possible effect on interstate commerce. Since Congress does not have power to regulate the prices charged for goods sold in interstate commerce, the fact that information as to such prices is perhaps intermingled with information as to the prices of products sold within a single State does not warrant Congress in securing all the information as to all prices of any manufacturer.

***The Intrastate Activities of the Appellees
Have No Bearing on Interstate Commerce.***

The Appellants also contend that Congress has the right to the information as to other than interstate commerce because the other operations of the Appellees have a direct bearing on their activities in interstate commerce. In the *Goodrich Transit Company* case, *supra*, from the nature of the case the rates charged for intrastate services or the expenses incurred in intrastate business might have a direct bearing on the reasonableness of the rates charged for interstate services, with which rates the Interstate Commerce Commission was authorized to deal. In the instant case Congress has no control over the mere amount charged by the Appellees for the goods sold by them even in interstate commerce and, therefore, regardless of any bearing which the cost of manufacturing such goods may have on the price thereof, such cost does not have any direct bearing on interstate commerce or any phase thereof over which the Commission or Congress has jurisdiction.

The price charged for a commodity may of course have a bearing on interstate commerce therein in the sense that if the public has been accustomed to buy cotton at between 10 and 15 cents per pound and the price thereof is raised to between 30 and 40 cents a pound, the ability or willingness to buy cotton and the amount of interstate commerce in cotton may thereby be reduced. Such bearing, however,

is not the direct bearing on interstate commerce which is referred to in cases where it has been held that the intrastate affairs there involved had such a direct bearing on interstate commerce that Congress could regulate the intrastate affairs.

Congress does not have control over prices *per se* such that it can establish the rule by which a seller must name his price or the purchaser name the price which he is willing to pay. The Court has repeatedly held that a person engaged in a business not charged with a public interest, such as the manufacturer or mining operator, may sell or not sell to any one in interstate commerce or otherwise solely at his own pleasure and that he may sell at such price as he and the purchaser may agree upon.

Wolff Packing Co. v. Court of Industrial Relations, supra.

Congress may prescribe any rule which it may reasonably deem necessary to prevent those making an agreement from directly affecting the interstate commerce of others and thereby impeding the freedom of interstate commerce which the commerce clause was intended to preserve.

Thus neither by reason of the intermingling of the accounts nor by reason of any bearing that prices as such may have on interstate commerce does Congress have any control over prices in and of themselves, and there is therefore no reason why Congress should be held to have the power to inquire into prices, merely as prices, or into the constituent elements of the cost on which to some extent such prices may be based. Hence the Commission has not been given and could not be given any power to inquire into prices charged by the Appellees for the commodities manufactured or mined by them, except perhaps in so far as the Commission may require reports concerning, or conduct an investigation into, some specific question connected with the obedience of some or all of the Appellees to some rule involving prices which Congress has established for the regulation of interstate commerce

or some question material and relevant to possible regulation by Congress. There is no indication that the Commission had any such rule in mind; its avowed object was to publish the results of its investigation. In any event, the average of prices cannot be involved in any such rule.

The Examination of Books to Check the Reports Must Be Also Properly Limited.

The Supplemental Brief contains a curious argument to support the contention that the information which may be required to be reported is not limited to interstate business. It is claimed that the Commission has the right to examine the books of the Appellees to verify the reports which it requires to be filed and that in such verification it would of course be necessary to examine the figures on all the business of the Appellees, whether interstate or intrastate. This argument amounts to a claim that because the Commission later on would exceed its authority it should be permitted to exceed such authority at the outset. The Commission's right of access to the books for the purpose of verification of the figures included in reports clearly cannot be any greater than its right to require the filing of reports.

In the *Tobacco Companies* case, *supra*, the Court has just decided that the only authority given to the Commission to examine documents or records of a corporation is limited to those documents and records which are material to some investigation of a particular corporation or some proceeding against such corporation. The Act does not contain any specific grant of authority to the Commission to examine records merely to verify reports made to the Commission. We are unable to see any distinction as to the reasonableness of search between an inspection of the records, which according to the *Tobacco Companies* case, *supra*, must be in a proceeding against or investigation of a particular corporation, and the filing of a report which must be correctly made out and duly authenticated under the compulsion of a threatened penalty or a man-

damus proceeding, except possibly that the former may in some cases involve a greater degree of unreasonableness merely in the manner in which it may be conducted. Certainly if reports when filed are to be checked against the books, the right of access to the books must be subject to the principles laid down in the *Tobacco Companies* case, *supra*. If that be not so, the power of the Commission is less restricted when a violation of law is not charged than when an alleged violation is being investigated.

Profits or Prices Are Not the Concern of the Commission.

In their Supplemental Brief the Appellants endeavor to prove their power to secure information of the several kinds demanded. They argue that the cost of production of merchandise sold by the Appellees in interstate or intrastate commerce may be required because without knowing the cost the Commission cannot know what are the profits of the Appellees and, they contend, it is entitled to know such profits because the public is vitally interested in the prices and profits of the Appellees, and information respecting prices and profits made in interstate commerce is of vital importance in dealing with commerce. It is stated that the principal object of legislation affecting combinations in restraint of trade and regulating interstate commerce is because of the effect on prices.

In an investigation, whether as to a violation of law already enacted or as to the advisability of enacting further legislation for the regulation of commerce, the prices actually charged for commodities sold in interstate commerce may be of some value as evidence. The prices themselves, however, taken apart from all other circumstances, would not have any value as evidence. The facts as to prices would be evidence, that is, they might be material to such an inquiry, but only after proof that there were influences at work affecting such prices which were not the result of the unhampered play of economic forces.

Thus the facts as to prices and such other proof might tend to prove that some one other than Congress was regulating interstate commerce, that it was establishing the rule whereby such commerce should be governed. Congress in effect has said that it is unlawful for two or more people to agree that certain commodities shall not be sold except at certain prices. The Courts have sustained such legislation not because the prices so affected were too high or too low, but because it is proper for Congress to forbid any one interfering with that freedom of interstate transactions which by the commerce clause was to be protected by Congress. The purpose of all such legislation, therefore, is to prevent a usurpation of Congressional function. Unless therefore the facts as to prices are required in connection with some investigation as to whether or not the freedom of commerce is being restrained, Congress has no interest in prices and hence in the profits made on such prices, and therefore none in the costs upon which such profits are calculated.

Productive Capacity and Production Do Not Concern the Commission.

The argument that plant capacity, actual production and unfilled orders are matters of importance to Congress because certain conclusions might be drawn from such information if it revealed certain conditions is not very conclusive. In the Supplemental Brief it is stated that if high prices and large profits were accompanied by capacity production and a continually increasing quantity of unfilled orders it would merely show that demand was out-running supply, but that if the Appellees were found to be making large profits while their plants were partly idle it would indicate the presence of influences affecting interstate commerce requiring action or legislation. We are unable to see how interstate commerce would be less affected by high prices and large profits when plants are partly idle than when they are working to capacity.

Prices of grain may be high or low and profits of farmers may be great or small while the amount of land under cultivation may be greater or less, but, regardless of the combination of facts as to these, we do not see how any possible combination thereof would indicate influences affecting interstate commerce which would require legislation. As a general rule grain prices are fixed from day to day by the quotations in Chicago or Liverpool, which quotations affect the price in every farming village in the country. The fact that the price of grain and the profits of farmers may be very low may be deemed in time of stress a warrant for Congress legislating for the relief of the farmers, but we have not seen any suggestion in any case and it has not been contended any where in either of the briefs of the Appellants that such conditions would necessitate or authorize the requiring of information from every farmer as to his operating costs and profits.

If what the Commission means is that it would conclude from the fact that corporations were making large profits while their plants were partly idle that such corporations were combining to maintain prices regardless of reduced demand then it would be in order for the proper government authorities to investigate not the question of prices as prices or the question whether profits were large or small or the productive capacity or the use thereof, but whether the combination of particular corporations suspected in the case supposed actually existed. As an incident to the investigation of that question the proper authority might be warranted in requiring the production of evidence as to profits and prices.

Proper Subjects To Be Covered by Reports Can Readily be Suggested.

In the Supplemental Brief for the Appellants (Page 31) it is said that the "constitutional question cannot be avoided by any interpretation of the Act". On page 2 of the Supplemental Brief the question presented by this case is said to be whether the Federal Trade Commission had

power to require certain corporations engaged in interstate commerce to file with the Commission periodical statements of their financial operations and reports of their business. We have shown above that such is not the actual question presented, but if it were it might involve a constitutional question if the only possible interpretation which could be placed upon the Act would necessitate the conclusion that Congress had endeavored to give to the Commission the broad power contended for by its counsel. Such an interpretation is not necessary and, of course, will be avoided if there is another possible interpretation which will not lead to the attributing to Congress of "an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law".

Such another interpretation is open to the Court. As above stated it is unnecessary for us to indicate, or for the Court to decide, what reports Congress could authorize or has properly authorized the Commission to require. All that it is necessary for the Court to decide in this case is whether or not the Appellees can be required to file monthly the particular reports demanded by the Commission. The field of interstate commerce is so vast and the affairs of corporations engaged therein are so ramified that there would appear to be abundant opportunity for the exercise of the powers set forth in paragraph (b). A survey of the interstate matters as to which the Commission has been charged with specific duties would readily suggest numerous subjects, including various kinds of information "as to the organization, business, conduct, practices, management" and inter-corporate relations of a corporation, concerning which annual or special reports might perhaps be justified on the ground that they involve matters in respect of which the Commission has duties to perform. Without presuming to indicate the limits of the reports, which it is the province of this Court to mark out in proper cases, and without committing ourselves to the approval of any particular demand that might be made by the Commission, we can suggest the following duties of the Commission

as indicating possible occasions for the requirement of reports:

(a) Congress has enacted in Section 2 of the Clayton Act that it shall be unlawful for a person engaged in interstate commerce to discriminate in price between different purchasers of commodities where the effect may be "to substantially lessen competition or tend to create a monopoly". It may be that the Commission can secure from corporations reports bearing upon their conduct in respect of this enactment.

(b) Section 5 of the Act declares unfair methods of competition to be unlawful. The Commission is constantly passing upon questions involving the lawfulness of certain practices. Possibly reports might be required from corporations which should contain information showing whether or not practices which have been held unlawful are being employed.

(c) Congress, in Section 3 of the Clayton Act, has also declared it unlawful for any person engaged in commerce to insert a tying clause in any lease, sale or contract for the sale of goods in interstate commerce. We do not admit that the Commission could at its pleasure secure full information from corporations as to all their contracts in interstate commerce but the Commission might perhaps require reports of such a character that from them the Commission could determine whether or not tying clauses were being employed by the reporting corporations. Perhaps, also, corporations might be required to report the facts as to other contracts which might be deemed to amount to an unlawful restraint of interstate commerce.

(d) Section 7 of the Clayton Act forbids a corporation engaged in commerce to acquire stock of another corporation also engaged therein or of two

other such corporations where the effect may be "to substantially lessen competition" between the two or "to restrain such commerce" or "tend to create a monopoly". It is possible that reports could be required from corporations as to stocks in one or more competing corporations purchased by them.

(e) In Section 8 of the Clayton Act it is provided that no person shall at the same time be a director in any two or more corporations any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce so that the elimination of competition by agreement between such corporations would constitute a violation of the provisions of any of the anti-trust laws. Annual reports from corporations having the specified capitalization which should show the names of the directors thereof and the names of the other corporations, if any, in which any of such directors are also directors might be deemed proper.

(f) Under Section 10 of the Clayton Act a common carrier engaged in commerce is forbidden to have certain dealings to the amount of more than \$50,000 in the aggregate in any one year with another corporation, firm, partnership or association when the carrier shall have as a director, president, manager, purchasing or selling officer or agent in the particular transaction a person who at the same time has a similar position or any substantial interest in such other corporation, firm, partnership or association unless the dealings shall be conducted on the basis of competitive bidding. Reports might perhaps be proper which should show those dealings of the reporting corporation with common carriers that might involve a violation of this enactment.

(g) Under the Webb Act (40 Stat. 516) corporations may without violating the anti-trust laws com-

line solely for the purpose of engaging in export trade. Reports as to membership in any such combination or association might possibly be required.

The foregoing is not intended to set forth a complete and exclusive list of the subjects which might be covered by annual or special reports from corporations, or even as a concession that, except under most careful limitations, annual or special reports as to any or all of such subjects might be required. It is offered merely to indicate the large field within which it is conceivable that annual or special reports of the character specified in paragraph (b) of Section 6 of the Act may be required and to suggest a reasonable interpretation of the language used in that paragraph which would avoid the attributing to Congress of any intent to defy the Fourth Amendment or to come in close thereto as to raise a serious question of constitutional law. The field for such reports may of course be widened as Congress shall hereafter commit to the Commission the enforcement of additional regulations for interstate commerce.

It is worthy of note that in the case of carriers engaged in interstate commerce, concerning which this Court has intimated there may be nothing private, Congress has specified in detail what can be required by the Interstate Commerce Commission in the way of annual reports.

Interstate Commerce Act, §20 (1), as amended, 41 Stat. 584, 593:

"Each annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, fixtures, and equipments; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the char-

order of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balance of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; * * *"

The Report from the House Committee on Interstate and Foreign Commerce (copy annexed to the Commission's Main Brief) which was submitted to the House with the bill which, with amendments, was subsequently adopted as the Federal Trade Commission Act, described the annual reports provided for by the bill as reports "setting forth essential facts connected with the organization, stockholders, financial condition and general business conduct of those concerned." The Report expressed the idea that such reports would "afford one of the surest means of that publicity which would tend to an elevated business standard and a better business stability." The language used by the Committee indicates that what it was primarily interested in was the organization, financial condition and general (not specific) business practices of corporations, particularly of those having such financial strength as to give cause for concern, although it was recognized that small corporations may have such an organization or financial condition or a system of practice as to require publicity to bring about lawful methods in their business. Hence the original bill provided for the classification of corporations having a capital of less than \$5,000,000, and that the Commission might also require reports from those so classified if it should deem it proper. An annual report that would meet what appear to have been the views of the Committee would give information as to the corporate structure, the stock holdings, the financial condition and the general business methods of the reporting corporation. Whatever may have been the views of the Committee or the intention of

Congress, there is nothing in the Report of the Committee to indicate that the annual reports desired were to cover costs of production, profits, accounting systems, or the other details of the corporate business such as the Commission has demanded in the present case. On the contrary, those subjects lie wholly outside the scope of the character of reports referred to by the Commission. Obviously the purpose was not to require periodical reports as to current business conditions in an industry.

Manufacturing Is Not a Public or Common Calling.

As observed by the Court in its opinion in the *Tobacco Companies* case, *supra*, "the mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public as those of a railroad company now may be".

The distinction is obvious between the present case and the series of cases decided by the Court on which the Appellants especially rely in seeking to support their proposition that it is entitled to obtain information from the Appellees regarding their intrastate operations, including production and manufacture, on the theory that those operations are in some way connected with or have a direct bearing upon interstate commerce. We refer to those cases in which the Court has upheld the power of Congress to authorize an administrative Commission such as the Interstate Commerce Commission, or an executive officer such as the Secretary of Agriculture, to require reports from, or to regulate the intrastate activities of, certain corporations because of the effect which their operations have upon the flow of interstate commerce.

Stafford v. Wallace, 228 U. S. 493;

Board of Trade v. Olsen, 262 U. S. 1; and

I. C. C. v. Goodrich Transit Company, *supra*.

In all those cases the Court was dealing with corporations which were not primarily engaged in commerce, but rather in the management of instrumentalities of commerce or activities affecting interstate commerce which, although intrastate in their direct application, had also a vital bearing upon the flow of commerce between states. Manifestly the misuse of such instrumentalities and activities would have a direct bearing upon interstate commerce and might result in the very evils in respect of interstate commerce which existing legislation seeks to correct.

Clearly those decisions have no bearing on the present case for here the manufacturing corporations concerned come in contact with interstate commerce only when they purchase or ship raw materials from mines in one State to plants in another or sell and deliver their own manufactured products in States other than the State of production. The manufacturing operations and intrastate sales of manufacturing corporations cannot affect the flow of interstate commerce; nor can the prices charged by manufacturing corporations even in interstate commerce be the subject of Congressional legislation as are the rates charged by carriers engaged in interstate commerce.

The Doctrine of the Harriman Case Applies Here.

While the considerations thus far advanced seem sufficient for the present case, we still rely upon the argument in our main brief that the present order is invalid because of the doctrine in the case of

Harriman v. I. C. C., supra.

That doctrine is that, in order that such a public body as the Interstate Commerce Commission or the Federal Trade Commission may have authority to break down the barriers of privacy to obtain information, the investigation in which the information is sought must be deemed to relate to its other powers and the purposes expressed in

the statute. The Court said that, in the case of the Interstate Commerce Commission, the main purpose of the Act creating it "was to regulate the interstate business of carriers, and the secondary purpose for which the Commission was established, was to enforce the regulations enacted." In the case of the Federal Trade Commission the main purpose of the Act is to enforce its substantive provisions, chiefly the prevention of unfair methods of competition in commerce which the statute declares unlawful, to aid the Department of Justice in the entry of final decrees in anti-trust suits, to make investigations upon its own initiative of the manner in which such decrees are being carried out and to enforce certain provisions of the Clayton Act, which was pending in Congress at the time the Federal Trade Commission Act was enacted and was passed a fortnight later.

If the Commission merely for its own information can under paragraph (b) require the reports which it has demanded, then clearly the power which was denied in the *Harriman* case would be sustained, notwithstanding that it "is unparalleled in its vague extent" and that "no such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court." Furthermore that power would then be recognized where, as in this case, violation of law is not alleged or suspected, notwithstanding that limitations have, by the decision in the *Tobacco Companies* case, *supra*, been indicated for the exercise of the more limited power in cases of alleged violations of law.

***On the Appellant's Own Argument as to the
Fourth Amendment Its Order Violates
That Amendment.***

Finally, it automatically follows that, if and in so far as the order exceeds the authority of Congress to deal with interstate commerce, it is a violation of the Fourth Amendment, since, obviously, any search or seizure is unreasonable, and hence forbidden by that Amendment, unless some

reasonable necessity exists for invading the right of privacy.

The Commission has changed its position in respect of the Fourth Amendment. In its Main Brief it was argued that the Fourth Amendment applied only to criminal proceedings but that, at all events, if the Fourth Amendment might be invoked in other than criminal proceedings, corporations were not entitled thereunder to the same immunity as individuals. It is contended in the Supplemental Brief for the Appellants that the Fourth Amendment does not forbid all searches or seizures but only those that are unreasonable. It is therein admitted that the Fourth Amendment may be violated by the obtaining of information in a secret or intrusive manner accompanied by force or by a demand for information unreasonable in scope in that it unduly hampers the business of the citizen or imposes upon him unreasonable expense, and by implication it is argued that a search or seizure is not unreasonable unless made secretly, stealthily or in a burdensome manner.

The Appellants contend that the demand of the Commission in the present case is not unreasonable, because of various conditions which are asserted to exist. In support of this position the Appellants make certain vague statements (Supplemental Brief, pp. 14 and 15) which cannot be considered as of any weight as proving anything pertinent to this case. In those statements it is suggested that the "veil of secrecy has already been largely lifted from the affairs of corporations, especially of the type here involved"; that "corporations having vast capital and engaged in large enterprises usually have large numbers of stockholders entitled to periodical reports on the business, and the making of such reports to the stockholders broadcasts information respecting their affairs"; that "corporations having their stocks listed on stock exchanges for the information of investors file and publish very complete information respecting their affairs"; that "the information called for here is largely of the statistical type which modern trade associations exchange among

their members"; and that "a considerable part of the information called for in these reports could be obtained, if Congress authorized it, from the reports filed with the Commissioner of Internal Revenue."

If what is meant to be implied from these statements is that private matters of the character of those demanded by the Commission, particularly costs, selling prices and profits of the respective Appellees on particular products and all the details of their accounting practices, are no longer under the protection of the Fourth Amendment because of some peculiarity of the Appellees as corporations, or that all such information is required by the laws of one or more States to be filed in periodical reports for public inspection or that it is, or may be required to be, reported periodically to stockholders or to stock exchanges or to trade associations or to the Commissioner of Internal Revenue, then the statements are without basis in fact. Whatever the Appellants may have meant by such statements, they are inaccurate and misleading, for we are confident that ordinary business corporations of whatever type do not file with the States which incorporated them or furnish to their stockholders or to any stock exchange or trade association a very large and most important part of the particular information which the Commission has demanded in this case.

Whether corporations do so or not is, however, beside the point. To say that, because a limited number of corporations have, for purposes of their own, voluntarily disclosed certain information to their stockholders or competitors or to stock exchanges, or have complied with the provisions of the laws of the States of their incorporation requiring the filing of certain reports, every corporation (including those that have not done so) may be compelled by the Commission to make such information public would make the authority of the Commission depend not on a constitutional grant but on the caprice or whim of the Commission. Under such a rule, whenever the Commission thought that the number of corporations voluntarily furnishing such information to a more or less limited public was suf-

ficient to make it desirable to require all corporations to file reports with the Commission, it would have authority to do so. Any such conception of the powers of the Commission or of Congress is contrary to every fundamental principle of constitutional law.

Moreover, the Appellants themselves in their Supplemental Brief openly admit the soundness of the principle on which we have been insisting throughout, which utterly controverts the arguments heretofore presented by the Appellants as to the Fourth Amendment. In their Supplemental Brief (p. 13) the Appellants admit that under the Fourth Amendment "there may also arise the question whether the nature of the information is such as to make it reasonably required in the public interest". That Brief cites the case of *Kilbourn v. Thompson*, 103 U. S. 168, as a case "where a committee of the House of Representatives demanded information and evidence with respect to a matter on which Congress had no power to legislate, and where, investigation 'could result in no valid legislation,' and where it was only a fruitless and intrusive investigation into private affairs."

The principle announced in the *Kilbourn* case, to which the Commission thus refers, is that Congress can invade the privacy of a citizen, or authorize it to be invaded, only when the information sought concerns a subject matter of which Congress has jurisdiction. That case clearly holds that a general power does not exist in Congress or either House to make fruitless or intrusive inquiry into the private affairs of a citizen. That holding was reaffirmed in the case of *I. C. C. v. Brimson*, 154 U. S. 447, and in the *Chapman* case, 166 U. S. 661; and most recently in the *Tobacco Companies* case, which involved the right of corporations to protection against the Commission.

While the right of privacy must at times yield to governmental authority, any intrusion whatever by the Federal Government into the private affairs of a citizen not necessary in the exercise of some delegated or inherent power constitutes an unreasonable search and is clearly forbidden by the Fourth Amendment. This must be so

since, unless the search is necessary in the proper exercise of some power, it constitutes a mere prying into the private affairs of the citizen in order to satisfy governmental or public curiosity, the prevention of which was the fundamental purpose of the Fourth Amendment. A citizen may be compelled to disclose his private affairs when pertinent or relevant to some issue in a case being litigated in Court or before some governmental commission. He may likewise be compelled to make such disclosure before Congress or a Legislative Committee when pertinent to a subject with respect to which Congress has power to legislate. Unless referable to the exercise of governmental authority, whether legislative, judicial or administrative, within the proper field of jurisdiction of the legislative, judicial or administrative body, every search by an agency of the Federal Government into the private affairs of a citizen constitutes an unreasonable search under the Fourth Amendment. The primary purpose of that Amendment was not to protect the citizen against forcible or stealthy search or the disruption of his business by the conduct of a search, but to protect the highly prized right of privacy. In any case arising under the Fourth Amendment, therefore, the first requisite must be to determine the purpose of the inquiry. Protection against search clearly is the general rule and the right to search is the exception thereto.

We have referred above (page 5) to six different alleged purposes disclosed by the Answer and the Main Brief of the Commission as the cause of the demand for reports. Certain of those purposes are thus summarized in the Supplemental Brief for the Appellants (page 6) :

"The inquiry by the Commission originated from the fact that the attention of Congress was directed to high prices prevailing for certain basic commodities * * * and the House of Representatives, seeking the cause, called before one of its committees members of the Federal Trade Commission, who recommended inquiry into the conditions affecting costs and prices of these commodities, and Congress appropriated money for that purpose,

with the idea that the information obtained might disclose influences affecting interstate commerce and form the basis for additional legislation, *or enable the Commission to take some action, or relieve the situation through publicity.*"

We do not admit that the Commission is entitled to call for information to

- (1) "form the basis of additional legislation"; or
- (2) "enable the Commission to take some action"; or
- (3) "relieve the situation through publicity"; but it is clear that upon the Commission's own theory the Fourth Amendment would be violated unless the information sought were reasonably necessary for one of those purposes.

We have heretofore shown that the information desired cannot form the basis for any valid additional legislation. This case does not raise the question as to what information the Commission may properly require by means of reports. It is sufficient in this case to point out that the Appellees are not raising an academic question as to the power of Congress or the Commission to require reports, but are endeavoring to protect their right to keep private that information which the Commission has demanded. We have already indicated the character of that information and it is clear from the mere recital of the details called for by the Commission that the purpose of the Commission was primarily to secure the information as to costs, prices and profits, and have shown that Congress does not have power to regulate any of these three subjects.

Since Congress does not have power to regulate prices, costs or profits or any of the phases of production, it follows that the Commission, which is merely the creature of Congress, cannot have power to do so and the Act itself shows that Congress has not attempted to delegate to the Commission any right to exercise such power.

The third purpose suggested, namely, to enable the Commission to relieve the situation as to high prices

through publicity, implies that although the Commission cannot regulate prices or costs and although Congress cannot enact any regulation therefor, it can, by securing the required information and publishing it, exercise a regulatory power which it cannot exercise through legislation. If this be true then obviously there is no limit to the power of Congress directly or indirectly to make a general inquiry into the private affairs of a citizen and thus nullify the Fourth Amendment. Such a conception of the powers of Congress would be violative of the Fourth Amendment and directly opposed to the position taken by this Court in dealing with the attempt of the Commission to exercise similar powers in the *Tobacco Companies* and *Grain Companies* cases.

We cannot state more clearly or emphatically our own position on the fundamental principles involved in the case at bar than in the language of Mr. Justice FIELD in the case of

In re Pacific Railway Comm., 32 Fed. 241, 250:

"The investigation directed is to be distinguished from the inquiries authorized upon taking the census. The constitution provides for an enumeration of the inhabitants of the states at regular periods, in order to furnish a basis for the apportionment of representatives, and, in connection with the ascertainment of the number of inhabitants, the act of congress provides for certain inquiries as to their age, birth, marriage, occupation, and respecting some other matters of general interest, and for a refusal of any one to answer them a small penalty is imposed. Rev. St. §2171. There is no attempt in such inquiries to pry into the private affairs and papers of any one, nor are the courts called upon to enforce answers to them. Similar inquiries usually accompany the taking of a census of every country, and are not deemed to encroach upon the rights of the citizen. And in addition to the inquiries usually accompanying the taking of a census, there is no doubt that congress may authorize a commission to obtain information upon any subject which, in its judgment, it may be important to possess. It may

inquire into the extent of the productions of the country of every kind, natural and artificial, and seek information as to the habits, business, and even amusements of the people. But in its inquiries it is controlled by the same guards against the invasion of private rights which limit the investigations of private parties into similar matters. *In the pursuit of knowledge it cannot compel the production of the private books and papers of the citizen for its inspection, except in the progress of judicial proceedings, or in suits instituted for that purpose, and in both cases only upon averments that its rights are in some way dependent for enforcement upon the evidence those books and papers contain.*

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others, and also, in certain cases, for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners."

After quoting from the case of

Boyd v. U. S., 116 U. S. 616,

Mr. Justice FIELD continued:

"The language thus used had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings, but it is applicable to any such production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose. It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers,

without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans. * * *

"Compulsory process to produce such papers, not in a judicial proceeding, but before a commissioner of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant condemned in that case. The principles laid down in the opinion of Lord CAMDEN, said the supreme court of the United States, 'affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court with its adventitious circumstances; they apply to all invasions on the part of the Government, and its employes, of the sanctity of man's home and the privacies of life.' * * *

"This case (the *Kilbourn* case, *supra*) will stand for all time as a bulwark against the invasion of the right of the citizen to protection in his private affairs against the unlimited scrutiny of investigation by a congressional committee. The courts are open to the United States as they are to the private citizen, and both can there secure, by regular proceedings, ample protection of all rights and interests which are entitled to protection under a government of a written constitution and laws."

In his concurring opinion Judge SAWYER said (p. 263):

"* * * A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end."

The point actually decided in the *Pacific Railway Commission* case was that the Court could not under the Con-

stitution use its power in enforcing the production of testimony before the commission there involved, as the matter was neither a "case" nor a "controversy". This has been said in the case of

In re Gross, 78 Fed. 107,

to have been overruled by the *Brimson* case, *supra*, but the points there involved were different and in the *Brimson* case the Court quoted with approval the language of Mr. Justice FIELD. The underlying principle declared by Mr. Justice FIELD was later approved in the case of

Ellis v. Int. Com. Comm., 237 U. S. 431,

in which the *Pacific Railway Commission*, *Brimson* and *Harriman* cases were cited together as authorities against "fishing expeditions."

The Court has sustained Congress in extending the powers of the Interstate Commerce Commission in investigating violations of law and in informing itself as to the conduct and affairs of common carriers in matters affecting interstate commerce, but even in so doing has protected the rights of carriers in their purely private affairs, such as correspondence, as in

U. S. v. L. & N. Ry. Co., 236 U. S. 318.

In the *Tobacco Companies* and *Grain Companies* cases, *supra*, it has reaffirmed the underlying principles as to the rights of privacy of corporations even though engaged in interstate commerce. We cannot believe that it will now recognize the existence of a power "unparalleled in its vague extent" and authorize a subordinate agency of Congress "to sweep all our traditions into the fire" by the compulsory divulging of entirely private information and trade secrets regarding matters over which Congress has no legislative power and in the absence of even a shadow of suspicion of wrong doing and merely for the purpose of getting the information for publication.

The decree of the Court of Appeals sustaining the order of the District Court striking the amended answer of the Appellants from the file should be affirmed.

Respectfully submitted,

FRED D. CHAMBERLAIN,

HENRY A. WOOD,

A. ARTHUR BENNING,

of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 1.—OCTOBER TERM, 1926.

Federal Trade Commission and Victor Murdock, Huston Thompson, et al., etc., Appellants,

vs.

Claire Furnace Company, The Ella Furnace Company, Reliance Coke Company, et al.

Appeal from the Court of Appeals of the District of Columbia.

[April 18, 1927.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This was a bill in equity brought in the Supreme Court of the District of Columbia on behalf of twenty-two companies of Ohio, Pennsylvania, West Virginia, New York, Delaware, New Jersey and Maryland, in the coal, steel and related industries, to enjoin the Federal Trade Commission from enforcing or attempting to enforce orders issued by that Commission against the complainant companies, requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information in detail upon a large variety of subjects relating to the business in which complainant corporations are engaged. The authority under which the Commission professed to act was expressed in the following resolution adopted by the Commission December 15, 1919:

Whereas at a hearing held by the Committee on Appropriations of the House of Representatives on August 25th, 1919, the Federal Trade Commission was requested to suggest what it might undertake to do to reduce the high cost of living; and

Whereas the commission recommended to the said committee that it would be desirable to obtain and publish from time to time current information with respect to "the production, ownership, manufacture, storage, and distribution of food-stuffs, or other necessities, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices," and particularly with respect to various basic industries, including coal and steel; and

Whereas the said committee recommended an appropriation of \$150,000 for the current fiscal year for the said commission in consequence of this recommendation and the same was duly made by authority of Congress, and made available on November 4, 1919: Now, therefore, be it

Resolved, That the Federal Trade Commission by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission act, proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit. And be it further

Resolved, That such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke, and pig iron industries

Purporting to proceed under this resolution, the Commission served separate notices upon the twenty-two appellees and many other corporations, engaged in mining, manufacturing, buying and selling coal, coke, ore, iron and steel products, etc., which directed them to furnish monthly reports in the form prescribed showing output of every kind, itemized cost of production, sale prices, contract prices, capacity, buying orders, depreciation, general administration and selling expenses, income, general balance sheet, etc., etc. Elaborate questionnaires, accompanying these orders, asked for answers revealing the intimate details of every department of the business, both intrastate and interstate. A summary of these printed in the margin sufficiently indicates their contents.* The

*Summary of interrogatories submitted by Federal Trade Commission to sundry corporations with direction to report monthly.

- (1) Quantities of 44 specified products produced.
- (2) Costs of 15 products from each factory of owner, furnace, mill or other unit of operation.
- (3) Sales prices ("actual realization") of 19 products, separately as to domestic and export shipments.
- (4) Contract prices ("base price less freight allowance") named in orders for future delivery of 19 products, separately as to domestic and export shipments.
- (5) Capacity of ovens, furnaces, works and mills in respect of 18 products.
- (6) Orders booked during each month and orders unfilled at the end of each month respecting 19 products.
- (7) Depreciation and general administrative and selling expenses allocated to 17 products, details of income from other sources, balance of net income

concluding paragraph of the notice declared—"The purpose of this report is to compile in combined or consolidated form the data received from individual companies and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry both for the benefit of the industry and of the public."

Appellees did not comply with the inquiries in the notices but filed in the Supreme Court, District of Columbia, their joint bill against the Commission and its members, wherein they set out its action, alleged that it had exceeded its powers, and asked that all defendants be restrained "from the enforcement of said orders, and from requiring answers to said questionnaires, and from taking any proceedings whatever with reference to the enforcement of compliance with said orders and answers to said questionnaires;" also for general relief.

Without questioning the appellees' right to seek relief by injunction, the appellants answered, admitted issuing of the orders, claimed authority therefor under Sections 6 and 9, Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 721, 722, and further alleged and said—

That the reports were required "for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication and the consequent regulation of the interstate commerce of said complainants resulting from such publication of the true trade facts as to all of the business of complainants and of others engaged in commerce in those commodities, and including the purpose of making reports to Congress and of recommending additional legislation to Congress.

"Defendants allege that all of the information to be acquired through the answers to said questionnaires is necessary and has direct relation to regulation and control of the interstate and foreign commerce of complainants and others answering said questionnaires, and is sought by the Federal Trade Commission for the purpose and is necessary aid of the regulation of said commerce.

transferred to surplus, with details of interest, rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies, income from outside investments; and details of deductions from net income, including federal income and excess profit taxes, interest on bonds and notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officials

"Defendants admit that no complaint has been filed or is now pending before the commission against any of complainants for a violation of section 5 of the trade commission act, but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provisions of said trade commission act.

"That one purpose of the requirements made in this case is the gathering of complete information, which is necessary in the proper regulation through publicity of the true facts as to the interstate business of the industry. That such purpose can not be properly performed without the acquisition of the complete facts. That the acquisition of the complete information and facts required will effectuate such purpose, in that the dissemination of such complete trade information will tend to prevent undue fluctuations and panic markets based on ignorance of the true facts, or based on incomplete and partial or self-interested information, published only whenever and in so far as it may serve those self-interested who may publish it. That regulation by publicity is, and for a long time has been, recognized as one form of regulation which has been generally conceded to be fair and equitable to all concerned. That unless such regulation through public dissemination of the full and complete facts is carried out, other more drastic forms of attempted regulations without proper information may follow.

"That in addition to the regulatory effect, in and of itself, of such public dissemination of the complete facts, it is one of the purposes of these activities to gather and convey to Congress, for its information in the performance of its duties, the full and complete facts, in order that instead of legislating on incomplete or partial or prejudiced information, it may have the full facts before it. That if any regulatory effect upon intrastate commerce flows from such publicity, it is merely incidental to the general regulation of interstate commerce, as to which the power of Congress is complete."

The cause was heard upon motion to strike the answer from the files because it contained no adequate defense. The trial court concluded that as the propounded questions were not limited to interstate commerce, but asked also for detailed information concerning mining, manufacture and intrastate commerce, they were beyond the Commission's authority. "The power claimed by the Commission is vast and unprecedented. The mere fact that a corporation engaged in mining ships a portion of its product to other States does not subject its business of production or its intrastate commerce to the powers of Congress." It accordingly held the

answer insufficient and, as defendants declined to amend, granted the injunction as prayed. The Court of Appeals affirmed this action. 285 Fed. 936; 52 App. D. C. 202. The cause, here by appeal, has been twice argued.

Appellees were not charged with practicing unfair methods of competition (Sec. 5, Act of September 26, 1914) or violating the Clayton Act (c. 323, Secs. 2, 3, 7, 8, 38 Stat. 730, 731, 732). Orders under such charges can be enforced only through a Circuit Court of Appeals (Sec. 11, Clayton Act; Sec. 5, Federal Trade Commission Act).

The action of the Commission here challenged must be justified, if at all, under the paragraphs of Sections 6 and 9, Act of September 26, 1914, copied below, and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in Sections 9 and 10. They are application to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties.

"Sec. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and

names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

"(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

"Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce docu-

mentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine or not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

We think that the consent of the parties was not enough to justify the court in considering the fundamental question that has been twice argued before us. It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the Court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are

asked in these orders, show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.

This conclusion leads to a reversal of the decree of the District Court of Appeals and a remanding of the case to the Supreme Court of the District with direction to dismiss the bill.

Mr. Justice SUTHERLAND and Mr. Justice BUTLER took no part in the consideration or decision of this case.

The separate opinion of Mr. Justice McREYNOLDS

I think the decree below should be affirmed—the Commission went beyond any power granted by Congress.

This appeal was taken four years ago. Nearly seven years have passed since the cause began—June 12, 1920. Able counsel have argued it twice before us, but none suggested that the trial court erred in failing to dismiss the bill because there was an adequate remedy at law. Under well settled doctrine such a defense may be waived by failure promptly to advance it. *Reynes v. Dumont*, 130 U. S. 354, 395; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 484; *American Malls Co. v. American Surety Co.*, 260 U. S. 360, 363.

In my view it is now much too late for this court first to set up and then maintain the defense of lack of jurisdiction in the trial court, and I cannot acquiesce in the disposition of the cause upon that unstable ground. The real issue should be met and determined.